(13)

No. 91-719-CFH
Status: GRANTED

Title: Al C. Parke, Warden, Petitioner
v.
Ricky Harold Raley

Docketed:
October 30, 1991

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Sonego,Ian G.

Counsel for respondent: Clare,J.Gregory

40 printed copies ea. pet & appd

Entry	Date	Note	Proceedings and Orders
1	Oct 30 1991	G	Petition for writ of certiorari filed.
2	Oct 30 1991		Appendix of petitioner filed.
3	Dec 4 1991		DISTRIBUTED. January 10, 1992
4	Dec 10 1991		Waiver of right of respondent Ricky H. Raley to respond filed.
5	Jan 7 1992	P	Response requested -- BRW. (Due February 7, 1992)
6	Jan 27 1992		Supplemental brief of petitioner Parke, Warden filed.
7	Feb 7 1992		Brief of respondent Ricky H. Raley in opposition filed.
8	Feb 12 1992		REDISTRIBUTED. February 28, 1992
9	Mar 2 1992		Petition GRANTED.
			**********
10	Mar 16 1992	G	Motion of respondent for leave to proceed further herein in forma pauperis filed.
11	Mar 16 1992	G	Motion of respondent for appointment of counsel filed.
14	Mar 26 1992	D	Motion of petitioner to be excused from printing certain portions of the record in the joint appendix filed.
12	Mar 30 1992		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
13	Mar 30 1992		Motion for appointment of counsel GRANTED and it is ordered that J. Gregory Clare, Esquire, of Louisville, Kentucky, is appointed to serve as counsel for the respondent in this case.
15	Mar 31 1992		Opposition of respondent to motion of petitioner to be excused from printing certain portions of the reco filed.
16	Apr 6 1992		Motion of petitioner to be excused from printing certain portions of the record in the joint appendix DENIED.
17	Apr 14 1992		Brief amicus curiae of Criminal Justice Legal Foundation filed.
18	Apr 16 1992		Brief amicus curiae of United States filed.
19	Apr 16 1992		Joint appendix filed.
20	Apr 16 1992		Brief of petitioner Parke, Warden filed.
21	Apr 24 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	May 18 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	May 28 1992		Brief of respondent Ricky H. Raley filed.
24	Jun 26 1992		Reply brief of petitioner filed.

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No. 91-719-CFH

Entry	Date	Note	Proceedings and Orders
25	Jun 30 1992		Supplemental brief of petitioner Parke, Warden filed.
26	Jul 10 1992		CIRCULATED.
27	Jul 21 1992		SET FOR ARGUMENT MONDAY, OCTOBER 5, 1992. (4TH CASE).
28	Jul 27 1992		Record filed.
		*	Original proceedings U.S.Court of Appeals, Sixth Circuitand U.S. District Court, Western District of Kentucky.
29	Sep 21 1992	X	Supplemental brief of petitioner (Second Supplement) filed.
30	Oct 5 1992		ARGUED.

91-715

(1)

NO._____

Supreme Court, U.S.
FILED
OCT 30 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN — PETITIONER

- versus -

RICKY HAROLD RALEY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the Fourteenth Amendment requires that the prosecution prove the validity of a prior conviction offered for sentence enhancement by "clear and convincing evidence", when the state court's record of the prior conviction shows that the defendant was represented by counsel but is silent as to whether a Boykin v. Alabama, 395 U.S. 238 (1969), colloquy was given?

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN — PETITIONER

- versus -

RICKY HAROLD RALEY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Al C. Parke, Warden of the Kentucky State Reformatory and the Attorney General of the Commonwealth of Kentucky Petition for Writ of Certiorari to review of the judgment of the United States Court of Appeals for the Sixth Circuit, granting a conditional writ of habeas corpus in favor of the respondent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth (A3-A21) is reported as Raley v. Parke, ___F.2d ___ (6th Cir. 1991).

The opinion of the United States District Court for the Western District of Kentucky is not reported. (A21-A25) (March 15, 1990). The opinion of the Kentucky Court of Appeals affirming the conviction is not reported (A26-A33) (April 22, 1990). By order entered June 21, 1988, the Kentucky Supreme Court denied respondent's motion to review the opinion of the Kentucky Court of Appeals. (A7).

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit decided and filed September 19, 1991. Raley v. Parke, ____ F.2d ___ (No. 90-5446) [Appendix cited as "A"] (A1-A3), affirming in part and reversing in part the judgment of the United States District Court for the Western District of Kentucky (Civil Action No. C-89-0756(L)(A) (A21-A-25). The jurisdiction of the United States District Court was invoked pursuant to title 28 U.S.C. §2254. (See A21). This Court has jurisdiction to review the opinion of the Sixth Circuit Court of Appeals pursuant to Title 28 U.S.C. §2254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law[.]

Title 28 U.S.C. Section 2254 provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States..
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process o the existence of circumstances rendering suc process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for he writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of he circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a

> determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
>
> (f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

Respondent was indicted on May 13, 1986, for the felony offenses of second degree robbery and for being a persistent felony offender in the second degree, which are the offenses for which he is presently incarcerated. (A27). [The Sixth Circuit opinion erroneously refers to burglary rather than robbery. (A4).] On November 11, 1986, respondent filed a motion to dismiss count two of the indictment, which was

the persistent felony offender charge. (R.3; TR 36). [A persistent felony offender conviction operates to enhance the offense for the underlying crime by automatically increasing the minimum and maximum permissible punishment. Ky.Rev.Stat. 532.080.] The state court hearing was held on May 28, 1987, and the Kentucky trial court ruled that both convictions sought to be used by the prosecution as evidence were constitutionally valid. (A32-33; A5-A8.)

The first prior conviction relied upon by the Commonwealth to prove the persistent felony offender status in this case was entered on January 3, 1980, in which Respondent received a sentence of five years on each count of a three-count indictment for burglary offenses. The second prior conviction relied upon by the Commonwealth for the persistent felony offender status was entered on October 8, 1981, in which respondent received a sentence of five years upon a plea of guilty to third degree burglary and second degree persistent felony offender. (A22-A25.)

In State court, respondent argued that each of these two prior convictions were invalid because the State court record did not contain the transcript of guilty plea proceedings nor did it contain a record of colloquy between the court and respondent during the plea proceedings. Respondent contended the pleas were invalid because there was no showing that he knowingly waived the rights guaranteed him under the United States and Kentucky constitutions. The prosecutor filed certified copies of the judgment entered on the guilty pleas on the prior convictions. The State trial court advised the respondent that this shifted the burden of going forward on his claim of invalidity to him. Respondent argued that under the precedent of the Kentucky Supreme Court, the trial court had correctly stated the law, but he believed that because the records of the two prior convictions contained a "silent record" the earlier plea should be presumed constitutionally invalid. Respondent then took the stand and testified concerning his

recollection of the guilty pleas. Respondent testified to the effect that he did not remember whether the trial judge advised him of his constitutional rights in connection with the guilty pleas and was not familar with trial procedures. (A27-A33.)

The Commonwealth called as its witness, Tom Marshall, who had represented respondent in connection with the 1980 guilty plea. Mr. Marshall could not recall his representation of respondent during his testimony at the State court evidentiary hearing, but he did authenticate his signature on a document identified as "form plea of guilty that was used back in . . . 1979." Mr. Marshall confirmed that the certificate on that form showed that he was the attorney of record for respondent, that he had read and fully explained to respondent the allegations contained in the indictment, that he had fully explained his constitutional rights to him, and to the best of his knowledge and belief the statements and representations made by respondent in a written petition on a

plea of guilty were accurate and true, and that the plea of guilty was consistent with counsel's understanding of the facts as relayed to him by respondent and was consistent with Marshall's advice to respondent. [The form testified to by Mr. Marshall and the State court was added to the habeas record pursuant to order by the federal court. Another type of guilty plea form indicating the Commonwealth's recommendation for a plea of guilty, and signed by Mr. Raley and his then attorney, was produced concerning the 1981 guilty plea pursuant to order by the Federal District Court. (A7-A8)] The State trial court denied respondent's motion to suppress the prior convictions. Respondent then entered a conditional guilty plea pursuant to Kentucky Criminal Rule 8.09 by which to appeal the order denying the motion to suppress the prior convictions used to establish the persistent felony offenders status. (A27-A33; A5-A7.)

On April 22, 1988, the Kentucky Court of Appeals affirmed respondent's conviction in an

unpublished opinion. The Kentucky Court of Appeals concluded that the 1981 guilty plea conviction was valid and that there was sufficient evidence before the trial court to ascertain in its validity. (A26-A33). The Kentucky Court of Appeals stated in part (A32):

> However, while appellant contends that he was ignorant of the charges against him, he acknowledges he signed a form which specifies the charges in which he agreed to plead guilty. Furthermore, the fact that appellant was fully advised of his rights in 1979 permits an inference that he was still aware of his rights two years later in 1981. In addition appellant's testimony indicates that his knowledge and sophistication regarding his rights under our judicial system increase substantially after his first conviction.

On June 13, 1989, the respondent filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky attacking his persistent felony offender sentence and in particular the 1981 guilty plea conviction upon which was based. The District Court denied the writ essentially argreeing with the Kentucky Court of Appeals. (A21-A26.)

On September 19, 1991, the Sixth Circuit issued an opinion upholding the 1980 guilty plea but concluding that the Commonwealth had failed to prove the validity of the 1981 guilty plea. The Sixth Circuit panel found that it was bound by the previous Sixth Circuit opinion in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990). (A13.) The Sixth Circuit stated in part (A10 and A20):

> [Respondent] correctly notes that in Dunn we established that a State may not carry its burden under Boykin by utilizing a presumption, and that any extrinsic evidence it offers must be clear and convincing. He once again correctly notes that we specifically disapproved in Dunn of the burden-shifting procedure that the trial court used in this case.. . . [T]he District Court is directed to grant Raley's writ of habeas corpus if Kentucky does not within ninety days hold a new hearing under. . . Dunn v. Simmons on Raley's contention regarding his 1981 conviction [Citations omitted].

REASONS FOR GRANTING THE WRIT

This case presents two issues regarding the burden of proof for an attack on a previous felony conviction to be used in enhancing the sentence for a subsequent crime. The first issue is whether the Kentucky Supreme Court was

correct in requiring the defendant as the claimant asserting the invalidity of a previous conviction to go forward initially with the introduction of evidence to support his claim that his previous conviction or guilty plea was invalid. Dunn v. Commonwealth, 703 S.W.2d 874 at 876 (Ky. 1985), cert. denied, 479 U.S. 832; Conklin v. Commonwealth, 799 S.W.2d 582 at 583-584 (Ky. 1990) [specifically declining to adopt the standard established by the Sixth Circuit in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990)]. The Commonwealth of Kentucky contends that at least eleven other States and a majority of the circuits of the United States Courts of Appeals impose a similar burden on the defendant who collaterally attacks a prior conviction offered by the prosecution for a sentence enhancement. In addition, the Commonwealth contends that at least two circuits, the Seventh and Eleventh, have imposed the initial burden on the defendant who attacks a guilty plea under the habeas corpus statute, Title 28 U.S.C. §2254.

The second issue is whether the Sixth Circuit is correct in requiring the prosecution to satisfy the standard of "clear and convincing evidence" in establishing the validity of a previous conviction when the state court record is partially silent. The Commonwealth contends that no circuit of the United States Courts of Appeals other than the Sixth Circuit has imposed a "clear and convincing" burden of proof to establish the validity of a prior conviction as a requirement under the Due Process Clause.

The Sixth Circuit's opinion in this case is expressly based upon Dunn v. Simmons, supra. The Sixth Circuit's opinion in Dunn v. Simmons is expressly based upon Roddy v. Black, 516 F.2d 1380 (6th Cir. 1975) [denying habeas corpus relief]. Roddy v. Black was based primarily upon LeBlanc v. Henderson, 78 F.2d 481 (5th Cir. 1973), and Des Bouillous v. Burke, 418 F.2d 297 (1969). Des Bouillous expressly relied upon Wisconsin law to establish the "clearly convincing" burden of proof. See especially 418 F.2d at 300. Excluding Des Bouillous, Roddy and other Sixth Circuit opinions based upon Roddy,

no case cited by the Sixth Circuit and no case cited for respondent has imposed upon the prosecution the "clear and convincing" burden of proof to establish the validity of prior convictions. Previous Sixth Circuit opinions have placed the initial burden of going forward on the defendant or habeas petitioner. Robards v. Rees, 789 F.2d 379 at 385-386 (6th Cir. 1986); United States v. Sammons, 918 F.2d 592 at 604 (6th Cir. 1990). This Court has expressly rejected the "clear and convincing evidence" standard regarding the prosecution's burden of proof to establish a waiver of rights for a confession, and has instead adopted the preponderance of the evidence standard. Colorado v. Connelly, 479 U.S. 157 at 167-170 (1986); also see Patterson v. Illinois, 487 U.S. 285 at 299, N.12 (1988) [Miranda waiver rule derived from the Sixth Amendment right to counsel waiver case law]. This Court has also held that sentencing factors may be proved by a preponderance of the evidence. McMillan v. Pennsylvania, 477 U.S. 79 at 85 (1986). See also United States v. Lord, 711 F.2d 887 at 891,

n.3 (9th Cir. 1983); United States v. Newman, 912 F.2d at 1121-1122 (9th Cir. 1990) [preponderance of evidence standard adopted].

During the State trial court's evidentiary hearing in this case, the trial court required that the defendant present his evidence regarding his claim of invalidity before the Commonwealth presented its evidence. Pursuant to Dunn v. Commonwealth, 703 S.W.2d 876. In that case the Kentucky Supreme Court stated in part as follows:

> The presumption of regularity in judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Although not expressly noted in the Kentucky Supreme Court's opinion in Dunn, the procedure established in that case was a reiteration of

what the Kentucky Supreme Court had ruled previously in Phillips v. Commonwealth, 559 S.W.2d 724 (1977). In that case the Kentucky Supreme Court had relied primarily on this Court's opinion in Johnson v. Zerbst, 304 U.S. 458 at 468-469 (1938), and Chief Justice Reinquist's dissenting opinion in Loper v. Beto, 405 U.S. 473 at 499-502 (1972), in which he was joined by Chief Justice Burger, and Justices Blackmun and Powell. Also see id., 405 U.S. at 495-496 (Blackmun, J. dissenting); Id., 405 U.S. at 485 (White, J. concurring in judgment). In Loper v. Beto, Chief Justice Reinquist stated in part:

> In Johnson v. Zerbst, [supra], one of the landmark habeas corpus decisions of this Court, Mr. Justice Black said: "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. [Footnote omitted.] Where a defendant without counsel, acquiesces in a trial resulting in his conviction and later seeks relief by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a habeas corpus hearing, he does meet

his burden and convinces the court by a preponderance of the evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ."

. . . .

Under Johnson v. Zerbst, the burden in federal habeas corpus is upon him [the petitioner] to prove to the satisfaction of the federal habeas judge that he did not waive the right to counsel.. . . However, on the basis of his overall assessment of petitioner's credibility, the trial judge declined to believe these self-serving assertions. The uniform doctrine of cases, both in this Court and elsewhere, is that the finder of fact is entitled to wholly disbelieve the testimony of the interested witness.

The plurality of the court in Loper v. Beto,

405 U.S. at 479, n. 6, stated in part:

A dissenting opinion, post, at 502, implies that the District Court found that the petitioner did not meet his burden of proving that he had not waived his right to counsel in the Mississippi and Tennessee courts.

. . . .

But despite these observations, the Court of Appeals, perhaps recognizing the error in the statement of the District Court quoted above, did not rest its decision on a finding that the petitioner failed to meet his burden of proving the invalidity of the prior convictions. It reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either

> dismiss this case or affirm the decision below on the ground that the petitioner did not meet his burden of proving that the prior convictions were invalid. [Emphasis added.]

In Martin v. Ohio, 480 U.S. 228 at 232 (1987), the Court referred to its previous opinion in Patterson v. New York, 432 U.S. 197 at 210 (1977), in part as follows:

> We there emphasized the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion.

The United States Courts of Appeal, including the Sixth Circuit, have unanimously placed the burden of proof on the defendant to establish the invalidity of a prior conviction used for purposes of establishing the defendant's criminal history score under the federal sentencing guidelines. See United States Sentencing Guidelines, Title 18 U.S.C. Appendix, Commentary, Application note 6, Section 4A 1.2 and Section 4B 1.1. United States v. Unger, 915 F.2d 759 at 761 (1st Cir.

1990; United States v. Davenport, 884 F.2d 121 at 124 (4th Cir. 1989); United States v. Woods, 870 F.2d 285 at 287 (5th Cir. 1989); United States v. Bradley, 922 F.2d 1290 at 1297 (6th Cir. 1991); United States v. Brown, 889 F.2d 67 at 679 (7th Cir. 1990); United States v. Dickens, 879 F.2d 410 at 411-412 (8th Cir. 1989); United States v. Newman, 912 F.2d 1119 at 1121 (9th Cir. 1990). Also see United States v. Clark, 735 F.Supp. 861 (N.D.Ill. 1990), [placing burden on the defendant does not conflict with the decisions of this Court].

The Sixth Circuit opinion in this case cites Fox v. Kelso, 911 F.2d 563 at 570 (11th Cir. 1990), to support the Sixth Circuit's position that the entire burden of proving the validity of a conviction involving a silent record falls on the state in the habeas corpus proceeding. However, the Eleventh Circuit's opinion in Fox v. Kelso does not, in fact, establish such a burden. The Eleventh Circuit opinion in that case, states in pertinent part:

> In habeas challenges to the validity of a guilty plea, however, courts

> uniformly assigned to the state (once the petitioner satisfies his threshold burden of showing noncompliance with the requirements of Boykin v. Alabama, 395 U.S. 238 [1969]), the burden of showing that the plea was obtained constitutionally. [Parenthetical phrase in original. Footnotes and citations omitted. Emphasis added.] Although the decision in Clayton v. Blackburn, 578 F.2d 117 (5th Cir. 1978), appears to place the burden on the petitioner, we conclude that it refers only to initial threshold burden on the petitioner to present a prima facie case. See [United States ex rel Grundset v.] Franzen, 675 F.2d [870] at 877 [7th Cir. 1982]. From the record, it is apparent that Fox demonstrated that his guilty pleas were not taken in accordance with the procedures mandated in Boykin, thereby shifting to the state the burden to prove that they were nonetheless knowing and intelligent. [Emphasis added.]

As the Sixth Circuit opinion points out the Eleventh Circuit in Fox v. Kelso collects a number of cases from other circuits. Eliminating the cases from the Sixth Circuit and eliminating cases involving guilty pleas prior to Boykin since Boykin has been deemed not to apply retroactively, Hendron v. Cowan, 532 F.2d 1081 (6th Cir. 1976) [collecting cases], only two circuits have apparently placed the initial burden on the prosecution to establish the

validity of a guilty plea involving a silent or partially silent state court record. United States v. Pricepaul, 540 F.2d 417 (9th Cir. 1976); Sena v. Romero, 617 F.2d 579 at 580 (10th Cir. 1980), which expressly relies upon Pricepaul. In Pricepaul, the Ninth Circuit did place the initial burden on the prosecution to establish compliance with Boykin if the state court record was silent. However, the Ninth Circuit also stated as follows, 540 F.2d at 423:

> In these circumstances, it seems unfortunate to shift the burden to the government to prove compliance with Boykin if the defendant is unwilling to submit an affidavit specifically alleging that he did not voluntarily and intelligently waive the rights protected by Boykin. Because of this, if we were writing on a clean slate, we would hold that the burden shifts to the government to prove the guilty plea was voluntarily and intelligently made only after the person convicted (1) demonstrates that the record is silent as to whether the Boykin procedures were followed (neutral showing) (and (2)) offers an affidavit or other testimony alleging that in fact the required waiver procedure did not occur (positive showing). [Parenthical phrases in original.]

Subsequently, the Ninth Circuit receded from the rule of Pricepaul and in effect now follows

the above quoted dicta. United States v. Goodheim, 651 F.2d 1294 at 1297-1299 (9th Cir. 1981), appeal after remand, 686 F.2d 776 at 777-778 (9th Cir. 1982) [upholding prior conviction]; also see United States v. Newman, 912 F.2d 1119 at 1121-1122 (9th Cir. 1990) [placing burden on defendant]; United States v. Dickens, 879 F.2d 410 at 411-412 (8th Cir. 1989) [discussing Goodheim II, and other cases].

As noted in the above the Eleventh Circuit's position in Fox v. Kelso, is consistent with Kentucky's position in placing the initial burden of producing evidence on the defendant (or habeas petitioner) on a collateral attack regarding a previous guilty plea. Also see Moore v. Jarvis, 885 F.2d 1565 at 1570 (11th Cir. 1989); id., 885 F.2d at 1573 (Cox, J, dissenting) ["It is clear in this circuit that the absence of a Boykin hearing does not, without more, subject the convictions in question to collateral attack."] [Judge Cox wrote the Fox opinion]; Strozier v. Newsome, 926 F.2d 1100 at 1104 (11th Cir. 1991). The Fifth Circuit and Eighth Circuit have placed the

burden on the defendant (or habeas petitioner) even when a state conviction is collaterally attacked under Title 28 U.S.C. Section 2254. Bouchillon v. Estelle, 628 F.2d 926 at 928 (5th Cir. 1980); Walker v. Maggio, 738 F.2d 714 at 717 (5th Cir. 1984), cert. denied, 469 U.S. 1112; Luna v. Black, 772 F.2d 448 at 450 (8th Cir. 1985).

As previously noted, the Seventh Circuit in United States ex rel. Grundset v. Franzen, 675 F.2d 870 at 877-880 (7th Cir. 1982), has placed the initial burden on the habeas corpus petitioner to establish the invalidity of a guilty plea under collateral attack. In that case the Seventh Circuit stated, 675 F.2d at 880

> We do not believe that an evidentiary hearing is necessary in this case. If such a hearing were held, the initial burden would be on the petitioner. Grundset, however, has repeatedly asserted that he is unable to offer any additional evidence as to what transpired at his guilty plea proceeding [other than the fact that he cannot remember]. In the absence of convincing independent evidence that Grundset was not admonished in accordance with Boykin, his petition for habeas relief must be denied. [Emphasis added.]

More recently, in cases involving collateral attacks on prior convictions in the state courts offered to enhance the defendant's sentence under either the Armed Career Criminal Act or Violent Career Criminal Act, Title 18 U.S.C. Section 924(e), Section 922(g), and Appendix Section 1202(a)(1), which imposes a minimum sentence of 15 years incarceration without the possibility of parole, the Seventh Circuit has posed the entire burden of proof to establish the invalidity of a previous guilty plea conviction upon the defendant. United States v. Gallman, 907 F.2d 639 at 642-644 (7th Cir. 1990); United States v. Polk, 908 F.2d 212 (7th Cir. 1990); United States v. Boyer, 931 F.2d 1201 at 1204-1205 (7th Cir. 1991) [Federal trial judge was entitled to discredit the defendant's own self-serving testimony]; United States v. Henry, 933 F.2d 553 at 559-560 (7th Cir. 1991); United States v. Ferguson, 935 F.2d 862 (7th Cir. 1991). Also see United States v. Wilkinson, 926 F.2d 22 at 28-29 (1st Cir. 1991), cert. denied, 111 S.Ct. 2813 [collateral attack on prior conviction offered for Career Criminal

Act enhancement rejected without proof by government]; United States v. Davenport, supra [same].

As the Eighth Circuit opinion in United States v. Dickens, 879 F.2d at 411-412 notes, in Luna v. Black, 772 F.2d at 448 at 450 (8th Cir. 1985), the Eighth Circuit placed the initial burden establishing invalidity of a guilty plea on the habeas petitioner. "Where, however, records of prior convictions are silent as to whether counsel was present at a critical stage and where the accused introduces evidence intending to show that he was not in fact so represented, the burden then shifts to the state to prove that the accused was represented." [Emphasis added.]

The California Supreme Court has recently reiterated its ruling that a defendant collaterally attacking a previous conviction has the initial burden of producing evidence to establish the conviction's invalidity. People v. Sumstine, 36 Cal.3d 909, 206 Cal.Rptr. 707, 687 P.2d 904 (1984); Curl v. Superior Court, 51

Cal.3d 1292 at 1303-1304, 276 Cal.Rptr. 49, 801 P.2d 292 (1990):

> [W]hen a defendant seeks to collaterally attack the validity of a prior-murder conviction alleged as a prior-murder special circumstance, the defendant has the burden of proof in establishing the constitutional invalidity of the prior conviction.

Ten other states apparently follow a rule similar to that of Kentucky and California regarding the defendant's burden in collaterally attacking a prior conviction offered for sentence enhancement. State ex rel. Collins v. Superior Court, Maricipa County, 157 Ariz. 71, 1751 P.2d 1346 (1988); Watkins v. People, 655 P.2d 834 at 837 (Colo. 1983); Lacy v. People, 775 P.2d 1 at 6-7 (Colo. 1989), cert. denied, 110 S.Ct. 350; State v. Wright, 198 Conn. 275, 502 A.2d 911 at 917 (1986); Hall v. State, 273 Ind. 507, 405 N.E.2d 530 at 536 (1980); State v. Wilson, 684 S.W.2d 544 at 548-549 (Mo.App. 1985);State v. Desbiens, 117 N.H. 433, 374 A.2d 651 at 653 (1977); State v. Harper, 126 N.H. 815, 498 A.2d 310 at 315 (1985) ["We conclude that he defendant has not met her burden under Desbiens of going forward with evidence"]; State v. O'Neil, 91 N.M.

727, 580 P.2d 495 at 497-498 (N.M.App. 1978); People v. Harris, 61 N.Y.2d 9 at 15, 471 N.Y.S.2d 61 at 63, 459 N.E.2d 170 at 172 (1983); People v. West, 110 A.D.2d 971, 488 N.Y.S.2d 268 at 270 (N.Y.App 1985), appeal denied, 65 N.Y.2d 989 [applying Harris]; State v. Annino, 46 Or.App. 743, 613 P.2d 84 (1980); State v. King, 400 N.W. 878 at 879 (S.D. 1987); Stuck v. Leapley, 473 N.W.2d 476 (S.D., 1991) [discussing King and Dunn v. Simmons]. Also see Ex Parte Scott, 460 So.2d 1371 at 1374 (Ala. 1984) [prior conviction may no be collaterally attacked in habitual criminal proceeding]; State v. Oliver, 230 Neb. 864, 434 N.W.2d 293 at 297-298 (1989) [same].

This Court has repeatedly stated that a federal habeas court may not constitutionally impose a higher burden on the state for a habeas corpus collateral attack that exists for direct appeal. "[T]he burden of justifying federal habeas relief for state prisoners is greater than the showing required to establish plain error on direct appeal." Engle v. Isaac, 456 U.S. 107 at 134-135 (1982). "[T]he presumption that a criminal judgment is final is at its strongest i

collateral attacks on that judgment." Strickland v. Washington, 466 U.S. 668 at 697 (1984). When a federal court is reviewing the claim of a state prisoner in a federal habeas corpus proceeding that federal court owes due respect to the state's procedural rules. See Coleman v. Thompson, 111 S.Ct. 2546 at 2565, 115 L.Ed.2d 640 (1991) ["We also eliminate inconsistency between the respect federal courts show for state procedural rules and they respect they show for their own."]. In Marshall v. Lonberger, 459 U.S. 422 at 438, n.6 (1983), the court stated in part:

> Central to our decision [in Spencer v. Texas, 385 U.S. 554 (1967)] was the fact that the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules: It has never been thought decisions under the Due Process Clause establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. 385 U.S., at 564. [Quotation marks and brackets omitted.]

In a collateral attack upon a state conviction (pre-Boykin) pursuant to a plea of guilty in Winford v. Swenson, 517 F.2d 1114 and 1117-1118 (8th Cir. 1975), cert. denied, 423 U.S. 1023, the Eighth Circuit stated:

> [T]he Supreme Court has made it clear that a counseled guilty plea made by a competent defendant aware of the nature of the charge against him and induced by his desire to limit the possible penalty will not be set aside simply because the defendant later learns of constitutional rights which he did not know at the time that the guilty plea was entered. A guilty plea entered with assistance of counsel is presumptively valid. It is clear in the specific findings of the state judge that Winford's plea was an effectively and accurately counseled plea made with full knowledge of the nature of the charge. These findings are entitled to a presumption of correctness with the burden on the habeas corpus petitioner to establish that such factual determinations were erroneous. [Citations omitted.]

In Marshall v. Lonberger, supra, 459 U.S. at 457, this Court expressly noted that Lonberger's "experience in the criminal justice system" could be considered in evaluating the validity of his guilty plea to a previous felony conviction used to enhance his sentence under Ohio law. The lower federal courts have reached a similar conclusion. See United States v. Hafen, 726 F.2d 21 at 25 (1st Cir. 1984), cert. denied, 466 U.S. 962. In LoConte v. Dugger, 847 F.2d 745 at 751 (11th Cir. 1988), cert.denied 488 U.S. 958, the Eleventh Circuit concluded,

"[A] guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing." The Sixth Circuit apparently concluded that it was unconstitutional for the Kentucky Courts and the Federal District Court to presume that a defendant was aware of his constitutional rights on a guilty plea by reference of the fact that he was advised of his constitutional rights at a previous guilty plea within two years before the subsequent guilty plea because such an inference would require "us to treat persons with prior court experience differently than those for whom the current case is their first conviction." (A17). Thus, the Sixth Circuit's opinion in this case is contrary to Marshall v. Lonberger, supra, and other federal Courts of Appeals, that a court considering the validity of a guilty plea could consider the previous experience of the defendant in the criminal justice system in determining whether he knew his rights in connection with a plea of guilty.

Neither this Court nor any other United States Court of Appeals has ever required the prosecution to disprove the allegations of a suppression motion by "clear and convincing" evidence. A majority of the United States Courts of Appeals, including the Sixth Circuit, have placed the burden of proof upon the defendant who collaterally attacks a prior conviction introduced under the Federal Sentencing Guidelines. The Seventh and Eleventh Circuits, and apparently the Fifth, Eighth, and Ninth Circuits have placed the burden upon the defendant to prove the invalidity of a conviction collaterally attacked under the habeas corpus statute. Review by this Court is warranted to reconcile the conflict between the standard adopted by the Sixth Circuit solely for state prosecutions and the standard adopted by the other circuits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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91-719

No. _____

Supreme Court, U.S.
FILED
OCT 30 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN, Petitioner

- versus -

RICKY H. RALEY, Respondent

PETITIONER'S APPENDIX

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5446

RICKY HAROLD RALEY,
Petitioner - Appellant

v.

AL C. PARKE, WARDEN, Kentucky State Reformatory,
Respondent - Appellee.

Before: **Boggs**, Circuit Judge; **Brown**, Senior Circuit Judge; **Gibbons**, District Judge

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed in part, reversed in part, and a conditional writ of habeas corpus is granted in conformity with the opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant To Sixth Circuit Rule 24

No. 90-5446
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKY H. RALEY,
Petitioner-Appellant

v. ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

AL C. PARKE, WARDEN
Respondent-Appellee

Decided and Filed September 19, 1991

Before: BOGGS, Circuit Judge; BROWN, Senior Circuit Judge; and GIBBONS, District Judge.*

BOGGS, Circuit Judge. Petitioner Ricky Raley appeals from the district court's denial of his petition for a writ of habeas corpus. We affirm in part and reverse in part, with instructions that Raley's conviction shall be voided unless Kentucky holds an evidentiary hearing that conforms to the procedures we established in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990).

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*The Honorable Julia Smith Gibbons, United States District Judge for Western District of Tennessee, sitting by designation.

I.

Raley's petition involves his conditional plea of guilty in state court in May 1987 to burglary and Persistent Felony Offender, class I ("PFO I").[1] A person is guilty of PFO I if he or she has been convicted previously of two felonies in addition to the current conviction. Raley had pled guilty previously to two felonies, a three-count indictment for burglary in 1980 and one count of burglary in 1981.[2] In his 1987 guilty plea, Raley reserved the right to challenge the validity of the two convictions forming the basis for his PFO I conviction.

The state trial court held a hearing on Raley's contention before accepting the conditional plea. The hearing followed the procedure established by Dunn v. Commonwealth,

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[1]A conviction for PFO I is punished by a mandatory ten-year sentence.

[2]Raley also pled guilty to a charge of PFO II in 1981. A person is guilty of PFO II if he or she has one prior felony conviction.

703 S.W.2d 874 (Ky. 1985), cert. denied, 479 U.S. 832 (1986), in cases involving challenges to the validity of earlier guilty pleas where there was no record of the earlier plea proceedings. That procedure involves a shifting burden of proof. First, the Commonwealth must establish the fact of conviction. Then, the petitioner must present evidence showing either that his rights were infringed upon or that the procedures used were irregular. If the petitioner meets this burden, the burden then shifts to the government to prove the validity of the underlying judgment. Dunn, 703 S.W.2d at 876.

The hearing showed that there was no record of any colloquy regarding Raley's plea between the trial judge and Raley in either the 1980 or the 1981 case. Raley testified that he was unaware of his constitutional rights to a jury trial, to confront and examine witnesses, and to remain silent when he pled guilty to either charge. He testified that he had never had a trial, attended a trial, or paid attention to TV

crime shows that featured trials. He also testified that the judge accepting his 1981 plea told him only that he had a right to a jury. He concedes that he does not remember the entire colloquies he had with both judges, and that the judges accepting his pleas in 1980 and 1981 might have informed him of his rights.

Kentucky offered some evidence at the hearing that both pleas were entered knowingly and intelligently. It offered the records of conviction for both pleas. It presented Raley's attorney for the 1980 charge, Tom Marshall, who testified that, although he could not independently recall his representation of Raley, his general practice ws to inform his clients of their rights. Marshall also testified that he signed a "Certificate of Counsel" form attached to a "Plea of Guilty" form that detailed the constitutional rights a defendant would waive if he or she pled guilty. The certificate stated that Marshall had explained to Raley his constitutional rights. Raley did not object in any way to the

discussion involving the certificate or the "Plea of Guilty" form. The Commonwealth also cross-examined Raley, who admitted signing the "Plea of Guilty" form for the 1980 conviction. Finally, it showed that Raley had spent nine months in the state penitentiary in 1980 around other inmates who had been convicted by juries.

The trial court ruled that Raley entered knowing and intelligent pleas in each case, and Raley then entered his conditional plea. On appeal, the Kentucky appellate court, in a decision rendered on April 22, 1988, affirmed the trial court's decision. The Kentucky Supreme Court subsequently denied review.

Raley then filed his habeas petition in federal district court. Upon request by the court, the Commonwealth supplemented the record of the trial court hearing with certified copies of the "Certificate of Counsel" and "Plea of Guilty" forms for the 1980 plea. Raley did not object to the entry of these documents into evidence. The "Plea of Guilty" form, signed by

Raley, includes a section at paragraph 11 that reads as follows:

> I understand that I may, if I so choose, plead "Not Guilty" to any offense charged against me, and that if I should choose to plead "Not Guilty" the Constitution guarantees me (a) the right to a speedy and public trial by jury, (b) the right to see and hear all witnesses called to testify against me, (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor, and (d) the right to have the assistance of counsel for my defense at all stages of the proceedings.

The Commonwealth did not provide a "Plea of Guilty" form for the 1981 conviction. I did provide a copy of a form entitled "Commonwealth's Recommendation on a Plea of Guilty." This document mentions the charges against Raley, the facts of the case, and the Commonwealth's recommendation regarding the guilty plea. It is signed by both Raley and his attorney for the 1981 conviction, Thomas Clay.

The district court, on March 15, 1990, denied Raley's petition with the following words:

> [T]he record plainly reflects that at the time of his guilty plea in late

1979[3] Mr. Raley was fully advised of his constitutional rights, and signed a paper admitting that he had been so advised. His understanding of those rights cannot be assumed to have evaporated in a period of less than two years between that conviction and his 1981 conviction. Furthermore, the written record plainly shows that Mr. Raley was explicitly informed of the charges against him in 1981.

Raley filed a timely appeal on March 2, 1990. We issued a certificate of probable cause immediately, but delayed the hearing of the appeal after deciding that appointment of counsel would aid Raley's appeal. We issued an order of appointment on December 14, 1990, and specifically directed the parties to brief the issue of the constitutional validity of the 1981 plea in light of our decision in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990).

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[3]Raley signed the "Plea of Guilty" form in November 1979. However, the plea was not formally accepted by the court until January 1980.

II.

A

Raley contends that Boykin v. Alabama, 395 U.S. 238 (1969) and Dunn require us to find that his plea was not entered knowingly and intelligently. Raley correctly notes that no transcript of either his 1980 or his 1981 plea proceedings exist, thereby placing the burden on the Commonwealth to prove that he knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to remain silent. Boykin, 395 U.S. at 243. He again correctly notes that in Dunn we established that a state may not carry its burden under Boykin by utilizing a presumption, and that any extrinsic evidence it offers must be clear and convincing. Dunn, 877 F.2d at 1277. He once again correctly notes that we specifically disapproved in Dunn. Lighthart v. Parke, No. 90-5462 (unpublished opinion) (6th Cir. Dec. 10, 1990).

Raley concludes from this that Kentucky did not produce enough evidence to establish clearly

and convincingly his knowing and intelligent waiver of his rights. The fact of the silent record, combined with his testimony, creates a strong suggestion that he was not aware of his rights when he waived them. Raley criticizes Marshall's testimony by pointing out that Marshall could not independently recall ever representing him. He criticizes the importance of the "Plea of Guilty" form by pointing to his testimony that he did not read the form before he signed it.

The Commonwealth makes two arguments in response. First, it argues that Dunn was wrongly decided. It contends that the procedure followed by the trial court is consistent with a large number of cases that allegedly hold that the burden is always on the petitioner to prove that a writ of habeas corpus should be issued. Second, within our framework established in Dunn, the Commonwealth argues that it has provided clear and convincing evidence that Raley's plea was knowing and intelligent. For the 1980 plea, it points to the signed "Plea of

Guilty" form, which clearly enumerates the rights Raley waived. It also points to Marshall's testimony tht he habitually reviewed this form with clients pleading guilty before they signed it. This testimony is supported by the certificate signed by Marshall. For the 1981 plea, it primarily relies on the district court's statement that Raley cannot be presumed to have forgotten his rights in the less than two years that intervened since his 1980 proceedings. The Commonwealth also relies on parts of Raley's testimony that suggest he plea guilty in 1981 because he thought he was getting a good deal. Finally, it emphasizes that Raley was correctly informed of the charges lodged against him.

B.

Our prior decision in Dunn governs the disposition of this case. In Dunn, we expressly declared tht federal law, not state law, provides the appropriate standard for determining the constitutional validity of guilty pleas. Dunn, 877 F.2d at 1277, citing

Marshall v. Lonberger, 459 U.S. 422, 431 (1983). Kentucky's suggestion that Dunn was wrongly decided is legally incorrect. Almost all of the cases cited by Kentucky are irrelevant, dealing either with the burden of showing that a prior conviction should not be counted under the criminal history calculations of the Guidelines or with issues in habeas proceedings different from that examined in Boykin. "In habeas challenges to the validity of a guilty plea, however, courts uniformly assign to the state [after petitioner shows noncompliance with the requirements of Boykin] the burden of showing that the plea was obtained constitutionally." Fox v. Kelso, 911 F.2d 563, 569 (11th Cir. 1990) (collecting cases). Even if Kentucky's argument were correct, it would be beyond our power to overrule the specific holding of a prior panel. Salmi v. Secretary of Health and Human Services, 774 F.2d 685, 689 (6th Cir. 1985). This court has already denied the Commonwealth's petition for a rehearing en banc to reconsider Dunn.

Our review of the evidence leads us to affirm the district court with respect to the 1980 plea, but reverse it with respect to the 1981 plea. We believe that the Commonwealth's proffer of the 1980 "Plea of Guilty" form conclusively establishes tht Raley was advised of his rights prior to pleading guilty. The form includes a specific paragraph listing the rights Raley was waiving, and informing Raley that he need not plead guilty. This lists includes three of the four rights Raley contends he ws not advised of, including the right to a trial by jury, the right to confront witnesses, and the right to compel witnesses in his favor to testify. Raley does not deny tha his signature is valid, and merely contends that he did not read the document before signing it. Were we to permit such self-interest allegations to override clear documentary evidence, a state could well find it impossible to meet its burden under Dunn.

We note that this court has previously found that a similar form satisfied the state's burden

of proof. In Brymer v. Dutton, No. 89-6102, slip op. at 6 (unpublished opinion)(6th Cir. June 17, 1991), a defendant making a Boykin challenge to a prior plea of guilty had signed a form stating that his attorney "has fully informed him of all of his rights and has explained them in detail," and that "a full explanation of his rights ws made to him in open court." The guilty plea form here is much more explicit, detailing the specific rights Raley waived.[4]

We reverse the district court, however, regarding the 1981 plea. The only relevant

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[4]Although no challenge to the admissibility of the form was made by Raley, we hold this form to be admissible. It qualifies as an exception to the rule against hearsay under Rule 803(24) because it is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," Rule 803(24)(B), Fed.R.Evid., and the interests of justice require us to consider the only contemporaneous documentary evidence of Raley's knowledge of his rights. Rule 803(24)(C), Fed.R.Evid. Assuming that Raley did not receive sufficient knowledge of the document's existence prior to the trial court hearing -- although the lack of any surprise on Raley's part suggests that is not

evidence offered by the Commonwealth on this point was that Raley had been advised of his rights less than two years earlier. The evidence regarding whether Raley thought he got a "good deal" with the 1981 plea was rightfully rejected as irrelevant by the trial court as the issue before us is not why Raley pled guilty; it is what Raley knew when he pled guilty. The evidence that Raley was correctly informed of the charges against him is also irrelevant, as it is Raley's knowledge of his rights, not the charges, that is called into question.

We do not believe that the relatively short period of time between Raley's two pleas permits us to infer that he was aware of his rights in

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the case -- Raley still was made aware of the document's existence more than two years before the district court requested a copy to supplement the trial court record. This fully satisfies the Rule's requirements.

Nor do we see any problem with authentication. The district court specifically stated that the copy of the form that it admitted was certified, making it a self-authenticating document under Rule 902(8), Fed.R.Evid.

1981. This presumption, if consistently applied, would lead to a host of difficulties. Where would we draw the line within which a defendant is presumed to have remembered his rights? Two years? Ten? Would we be constitutionally required under the due process clause to hold a hearing to test the persistence of a defendant's memory so that an individualized determination could be made?[5] We do not want to step down such a path, and Kentucky has cited no case law that requires us to do so. Also, this principle requires us to treat persons with prior court experience differently than those for whom the current case is their first conviction. Boykin does not apply solely to the situation here and in Dunn, that of a repeat offender challenging a conviction of being a recidivist. This rule would effectively deprive the recidivist of rights that a first-time offender possesses.

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[5]See S. Dali, "The Persistence of Memory." Cf. M. Proust, Rememberence of Things Past.

The constitution does not permit us to parcel out different measures of rights. Absent the presumption of persisting memory, the district court's denial of the petition must be reversed.

III.

This brings us to the question of the remedy. The normal remedy when a petition is granted is to vacate the conviction and release the prisoner from custody, permitting the state to retry the defendant within constitutional guidelines. That, of course, is what Raley asks us to do. However, we believe that to vacate Raley's conviction unconditionally would do an injustice to Kentucky.

The primary record for this appeal is the trial court hearing. That hearing occurred in 1987, two years before we decided Dunn v. Simmons. Thus, the Commonwealth was not aware that it possessed the primary burden of persuasion, and that it had to prove Raley's knowledge by clear and convincing evidence. Had it known this, it is conceivable that it would have produced more evidence, such as producing

either the judge who accepted the 1981 plea or Raley's 1981 attorney, Mr. Clay. The district court did not hold an evidentiary hearing below, and it is clear that Kentucky's main line of attack was to challenge the validity of Dunn rather than move for a new, federal hearing. Although Kentucky's Supreme Court has adhered to the procedure we disapproved of in Dunn, see Conklin v. Commonwealth, 799 S.W.2d 582 (Ky. 1990), we believe that the interests of justice require us to permit Kentucky a chance to produce additional evidence that it may not have produced at the trial court hearing because it thought such evidence unnecessary to meet its burden under its interpretation of Boykin.

We do not believe that we possess the authority to order Kentucky courts to hold a new hearing pursuant to our standards in Dunn. However, we certainly have the power to issue the writ of habeas corpus conditioned on the state not holding such a hearing. See Gardner v. Pitchess, 731 F.2d 637, 639 (9th Cir. 1984)("considerations of comity underlying the

habeas writ . . . require that state courts be given an opportunity to correct alleged violations before federal courts step in"); Hart v. Eyman, 458 F.2d 334, 338-40 (9th Cir.), cert denied, 407 U.S. 916 (1972). See also Hart v. Marion Correctional Institution, 927 F.2d 256 (6th Cir. 1991). That therefore is our course; the district court is directed to grant Raley's writ of habeas corpus if Kentucky does not within ninety days hold a new hearing under the procedure outlined in Dunn v. Simmons on Raley's contention regarding his 1981 conviction. See Hart, 927 F.2d at 259. Of course, if such habeas relief is granted, Kentucky is free to retry Raley for PFO II.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED in part and REVERSED in part, and a conditional writ of habeas corpus is granted in conformity with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RICKY HAROLD RALEY,
Petitioner

v.

Civil Action No.
C89-0756-L(A)

AL C. PARKE, WARDEN
Respondent

JUDGMENT

This matter having come before the Court on Petitioner's request for a writ pursuant to 28 U.S.C. §2254, and the Court having entered its memorandum opinion and being advised,

IT IS ORDERED that the petition is denied.

This is a final and appealable order and there is no just cause for delay.

3- 15-90
Date

/s/ CHARLES M. ALLEN
Senior United States
District Judge

cc:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RICKY HAROLD RALEY,
Petitioner

v.

Civil Action No.
C89-0756-L(A)

AL C. PARKE, WARDEN
Respondent

MEMORANDUM OPINION

This case presents petitioner's request that the Court issue a wit pursuant to 28 U.S.C. §2254. After examination of the materials of record and the arguments of the parties, the Court is of the opinion that an evidentiary hearing would no be of assistance, and that the petition must be denied.

The conviction petitioner challenges here occurred in May 1987. He enter pleas of guilty to a charge of burglary and a charge of being a Persistent Felony Offender in the first degree (PFO I). He received a total sentence of ten years. The predicate felony convictions used to

support the PFO I conviction occurred in 1979 (Indictment 79-CR-1214) and 1981 (Indictment 81-CR-0269), both involving guilty pleas. Petitioner's argument to this Court is that those prior convictions are insufficient to support the PFO conviction because the guilty pleas were not knowingly and voluntarily entered

The transcript of the state court evidentiary hearing conducted on this issue records petitioner's testimony that he did not recall either the judge or his attorney advising him of his rights [T.E. 14]. He did, however, admit that it was possible that the judge advised him of his rights on both occasions, but he did not recall [T.E. 34, 42].

The testimony of Mr. Marshall, who represented petitioner in 79-CR-1214, referred to a "plea of guilty" form, the purpose of which was to advise the defendant of his constitutional rights and to make a written record [T.E. 44-46]. A certified copy of that form has now been provided this Court. The form records petitioner's eleventh grade education,

recites that he has received a copy of the indictment, states that the defendant has consulted with his counsel concerning the charges, explicitly states the defendant's understanding of his constitutional rights, and is signed by Ricky Raley, November 29, 1979. On the same date, Mr. Marshall executed a form stating that he had fully explained to Mr. Raley the charges against him and Mr. Raley's constitutional rights, and that it was Mr. Marshall's opinion that Mr. Raley understood his rights.

While this Court has not been provided copies of these same forms for 81-CR-0269, we have been given a copy of the "Commonwealth's Recommendation on a Plea of Guilty," a document that recites the charges against the defendant, the facts of this case, and the recommendations on a plea of guilty. The paper concludes with the line "Agreed to this 8th day of October, 1981," and is executed by the Assistant Commonwealth's Attorney, by Ricky Raley, and by his attorney, Thomas E. Clay.

In short, the record plainly reflects that at the time of his guilty plea in late 1979, Mr. Raley was fully advised of his constitutional rights, and signed a paper admitting that he had been so advised. His understanding of those rights cannot be assumed to have evaporated in the period of less than two years between that conviction and his 1981 conviction. Furthermore, the written record plainly shows that MR. Raley was explicitly informed of the charges against him in 1981.

Accordingly, as there is no basis for the claim that the guilty pleas to the predicate offenses were not knowingly and voluntarily entered, the petition must be denied. An order in conformity has this day been entered.

3-15-90
Date

/s/ CHARLES M. ALLEN
Senior United States
District Judge

Opinion rendered: April 22, 1988, 3:00 p.m.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
INDICTMENT NO. 87-CA-1359-MR

RICKY HAROLD RALEY APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HON. BENJAMIN F. SHOBE, JUDGE
ACTION NO. 86-CR-790

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING
* * * * * * *

BEFORE: GUDGEL, MILLER, and WILHOIT, Judges.

GUDGEL, JUDGE: This is an appeal from a judgment entered any the Jefferson Circuit Court. Appellant pled guilty to the offense of being a persistent felony offender (PFO) in the first degree and was sentenced to a prison term of ten years. Pursuant to his reserved right under RCr 8.09, he contends on appeal that the trial court erred by denying his motion to prevent the use of two prior felony convictions as the basis for the instant PFO conviction. We disagree. Hence, we affirm.

Appellant pled guilty to a felony offense in 1979. In 1981, after spending a short time in prison, he was indicted both for a second felony offense, and as a second-degree PFO based upon his 1979 felony conviction. Appellant again pled guilty, and he was sentenced to a five-year prison term. A third felony indictment, including a charge of being a PFO in the first degree, was returned against him in 1986. After an evidentiary hearing the court determined that his 1979 and 1981 guilty pleas were valid. Appellant then agreed to plead guilty to the charges of second-degree robbery and first-degree PFO. This RCr 8.09 appeal followed.

First, appellant contends that the trial court impermissibly placed the burden on him to come forward with evidence to show that his convictions were invalid. We disagree.

The procedures to be observed in cases such as this were set out in Dunn v. Commonwealth, Ky., 703 S.W.2d 874, 876 (1985), cert. denied, _____ U.S._____, 107 S.Ct. 121, 93 L.Ed.2d 67 (1986), as follows:

> In those cases in which the defendant is indicted as a persistent felony offender and files a proper motion to suppress any evidence of his prior offenses, the burden is on the Commonwealth to prove the judgments of conviction in each of the underlying offenses upon which it intends to rely. The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did,, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Thus, Dunn places on the Commonwealth the ultimate burden of proving the validity of any previous felony convictions. Although the Commonwealth's initial burden of going forward is met if it produces valid copies of prior judgments, the presentation of evidence of irregularity by the defendant shifts the burden back to the Commonwealth to point to evidence in

the record which indicates the voluntary and intelligent nature of the questioned guilty plea. If the record is insufficient for this purpose, the court must hold an evidentiary hearing on the issue.

Appellant complains that the trial court erroneously required him to adduce evidence as to the invalidity of his convictions, rather than requiring the Commonwealth to prove affirmatively that the guilty pleas upon which the convictions were based were valid. Inasmuch as we are satisfied that the trial court properly placed the ultimate burden of persuasion on the Commonwealth, however, we conclude that the actual order of proof was irrelevant and nonprejudicial. Moreover, we conclude that even if we agreed that Dunn conflicts with certain federal cases cited by appellant (and we are not persuaded that it does) we could not, as an intermediate appellate court, refuse to follow Dunn. See SCR 1.030(8)(a).

Appellant also contends that the Commonwealth failed to meet its burden of proof, and hence, that the tira court erred by finding that his prior guilty pleas are valid. We disagree.

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternatives open to the defendant. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Proof of a guilty plea's voluntary and intelligent nature may be derived not only from the evidentiary transcript, but also from the totality of the circumstances surronding the entry of the plea, as may be established at a subsequent evidentiary hearing. See Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); Kotas v. Commonwealth, Ky., 565 S.W.2d 445 (1978). Among the pertinent factors to be considered are the accused's background, experience, and conduct. Lynch v. Commonwealth, Ky.App., 610 S.W.2d 902 (1980).

Here, the evidence shows that appellant had an eleventh grade education, that he could read adequately, that he was not intoxicated or otherwise incapacitated when he entered his questioned guilty pleas, and that he was represented by counsel on both occasions. With regard to his 1979 plea, the evidence also shows that his attorney certified that he had explained to appellant both the nature of the charges and the rights he would waive by pleading guilty. Moreover, appellant admitted that he signed a waiver form which both set out the charge against him and contained his acknowledgment that he was advised of his rights. Finally, appellant admitted that he could not specifically state that the trial court had not fully explained his rights to him. Further, he simply could not remember whether this had occurred. This evidence was sufficient, in our opinion, to support finding that appellant was made aware of his alternatives to pleading guilty, and that his 1979 guilty plea satisfied the dictates of

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The record contains less direct evidence as to the advice and counsel appellant received prior to entering his 1981 guilty plea. However, while appellant contends that he was ignorant of the charges against him, he acknowledges that he signed a form which specified the charges to which he agreed to plead guilty . Furthermore, the fact that appellant was apparently fully advised of his rights in 1979 permits an inference that he was still aware of his rights two years later in 1981. In addition, appellant's testimony indicates that his knowledge and sophistication regarding his rights under our judicial system increased substantially after his first conviction. He knew, for example, of the differences both between first- and second-degree PFO charges, and between sentencing and parole requirments for each offense. Indeed, he indicated that the evidence against him and his lack of a strong defense had

persuaded him to accept the Commonwealth's offered plea bargain in return for a recommendation that he be given a minimum sentence. In fact, he voluntarily and knowingly chose not to risk the uncertainties of a jury trial. Based upon the evidence adduced ant the totality of the circumstances surrounding the guilty pleas, we condclude that the trial court's implicit conclusion that appellant's guilty pleas satisfy the dictates of Boykin, supra, is not clearly erroneous, and that the court did not abuse its discretion by denying appellant's motion to prevent the use of those pleas as the basis for his most recent PFO conviction.

The court's judgment is affirmed.

WILHOIT, J., CONCURS.

MILLER, J., DISSENTS.

(3)

No. 91-719

Supreme Court, U.S.
FILED
JAN 27 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN — PETITIONER

- versus -

RICKY HAROLD RALEY — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Respectfully submitted,

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Pursuant to Rule 15.7 of this Court, the petitioner, Al C. Parke, Warden of the Kentucky State Reformatory, and the Attorney General of the Commonwealth of Kentucky hereby supplement their previously filed petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The opinions cited in this supplemental brief have been published by the West Publishing Company (or in the case of a not yet published opinion, issued by the court) subsequent to the filing of the petitioner's petition for writ of certiorari.

In United States v. Ruo, 943 F.2d 1274, 1275-1277 (11th Cir. 1991), the Eleventh Circuit held that the defendant had the burden to prove the constitutional invalidity of his prior convictions offered by the prosecution to enhance his sentence pursuant to the Armed Career Criminal Act, Title 18 U.S.C. §924(e) and §922(g)(1). The Eleventh Circuit specifically approved previous opinions of the Seventh Circuit, United States v. Gallman, 907 F.2d 639

at 643 (7th Cir. 1990), cert.denied 111 S.Ct. 1110 (1991), and United States v. Ferguson, 935 F.2d 862 at 866-867 (7th Cir. 1991). [See Petition p. 25.)

In Dressler v. State, 819 P.2d 1288 at 1290-1296 (Nev. 1991), the Nevada Supreme Court ruled that if the state court record of the prior conviction offered for enhancement indicated that the defendant was represented by counsel or otherwise does not raise on its face a presumption of constitutional infirmity, the defendant is required to present evidence that the prior conviction is constitutionally infirm in order to rebut the presumption of regularity of the criminal conviction. The Nevada Supreme Court cited, inter alia, United States v. Gallman, supra; and Dunn v. Commonwealth, 703 S.W.2d 874 at 876 (Ky., 1985), cert.denied 479 U.S. 832 (1986) The Nevada Supreme Court also stated in part, 819 P.2d at 1292:

> While it is true the courts may not imply a waiver of the constitutional rights from a silent record, it is also true that courts should not imply a constitutional deficiency in a judgment of conviction from a silent record.

The records regarding the prior conviction attacked by Dressler (like the prior conviction attacked by Raley) indicated that Dressler had been represented by counsel during his guilty plea to the prior conviction, but did not reflect an express waiver and enumeration of his constitutional rights as arguably required by Boykin v. Alabama, 395 U.S. 238 (1969). Nevertheless, the Nevada Supreme Court concluded that Dressler had failed to establish the invalidity of his prior conviction and affirmed the judgment and sentence of the trial court. "Thus, appellant failed in the district court to rebut the presumption that the prior conviction was constitutionally obtained." 819 P.2d at 1296. Nevada apparently follows the Kentucky rule regarding the defendant's burden for collateral attack on a prior conviction offered for sentence enhancement. [See Petition pp. 27-28.}

In United States v. DeForest, 946 F.2d 523 (7th Cir. 1991), the defendant attacked the prior convictions used to enhance the sentence

pursuant to the Armed Career Criminal Act. The Seventh Circuit again reiterated its rule from previous cases that the defendant bears the burden of demonstrating the invalidity of a prior conviction offered for sentence enhancement. The federal district court and the Seventh Circuit both expressly rejected DeForest's own self-serving testimony which he offered in an attempt to satisfy his burden. In discussing the validity of one of the three (3) prior convictions, the Seventh Circuit stated in part, 946 F.2d at 526:

> The voluntariness of the plea was even more apparent in view of the fact DeForest's prior convictions gave him some familiarity with the criminal justice system, and his change of plea after trial and conviction show an awareness of the right to plead not guilty.

Thus, the Seventh Circuit has recognized that the defendant's prior convictions are an appropriate factor to be considered in ascertaining the validity of a guilty plea at the time that it was entered. [See Petition at pp. 30-31.]

In United States v. James Lee Evans, ____ F.2d ___ (6th Cir. Nos. 90-6589 and 90-6590) (December 17, 1991), the Sixth Circuit reviewed, inter alia, the defendant's motion to withdraw his guilty plea because of an error in accepting the plea pursuant to Fed.R.Crm.P. 11(c). The Sixth Circuit upheld the District Court's decision to deny the motion for leave to withdraw the guilty plea. Slip.Op. at 2. The Sixth Circuit in upholding that decision discussed the District Court's reasons for that ruling, and stated in part, slip op. at 5:

> While conceding that he had not followed Rule 11(c) precisely in accepting the guilty plea, Judge Allen pointed out that Evans had recently been through a lengthy criminal trial in which he was found guilty, and had been sentenced by Judge Simpson. Therefore, Judge Allen concluded that Evans was aware of any constitutional rights that had not been specifically detailed at the plea session. Moreover, Evans had requested that the CCE [Continuing Criminal Enterprise] case be consolidated for the specific purpose of pleading guilty. He had made this motion with the advice of the retained counsel and with the knowledge of the scope of the government's case against him. Judge Allen then applied the harmless error provision of Rule 11 (h) and denied the motion.

Judge Allen was also the judge that denied Raley's petition for habeas corpus relief in this case. [See petitioner's appendix, p. A21.] The reasoning employed by Judge Allen in Evans case is very similar to the reasons that he employed in Raley's case. [See petitioner's appendix, pgs. A22-A25.] In this case the Sixth Circuit expressly rejected the idea that the reviewing court could consider the defendant's (or habeas petitioner's) prior experience in criminal justice system in evaluating the validity of a guilty plea under collateral attack. "This rule would effectively deprive the recidivist of rights that a first time offender possesses." [Petitioner's Appendix, pg. A17; Raley v. Parke, 945 F.2d 137 at 142 (6th Cir. 1991).

From the foregoing authorities, the Commonwealth submits that the Nevada Supreme Court, Seventh Circuit, and the Eleventh Circuit, have adopted a rule placing the burden on the defendant to establish the invalidity of a prior conviction offered by the prosecution to

enhance the defendant's sentence and that the rule which those jurisdictions have adopted is substantially the same as that followed by Kentucky. The rule adopted by those jurisdictions is clearly contrary to the rule imposed on Kentucky by the Sixth Circuit in this case.

Review by this Court is clearly warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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91-719

NO. _____

FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN — PETITIONER

– versus –

RICKY HAROLD RALEY — RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully submitted,

J. GREGORY CLARE

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Attorney for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the Fourteenth Amendment requires the Commonwealth of Kentucky to prove by clear and convincing evidence, the validity of a prior conviction offered for sentence enhancement. Additionally, whether the state may carry its burden of proof by use of a presumption in light of Boykin v. Alabama, 395 U.S. 238 (1969).

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN — PETITIONER

– versus –

RICKY HAROLD RALEY — RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Comes the Respondent, Ricky Harold Raley, by counsel, and responds to the Petition for Writ of Certiorari filed by Al C. Parke, Warden of the Kentucky State Reformatory and the Attorney General of the Commonwealth of Kentucky for review of a Judgment of the United States Court of Appeals for the Sixth Circuit granting the Respondent a conditional writ of Habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit [Appendix cited as A-3-A21] (A3-A-21) is reported as Raley v. Parke, ____ F.2d ____ (6th Cir. 1991). The opinion of the United States District Court for the Western District of Kentucky is not reported. (A21-A25) (March 15, 1990). The opinion of the Kentucky Court of Appeals affirming the conviction is not reported (A26-A-33) (April 22, 1990). By order entered June 21, 1988, the Kentucky Supreme Court denied Respondent's motion to review the opinion of the Kentucky Court of Appeals. (A7).

JURISDICTION

The United States Supreme Court has jurisdiction to review the Opinion of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. 1254(1). The judgment that the Petitioner seeks to have reviewed is a decision of the United States Court of Appeals for the Sixth Circuit styled Raley v. Parke, ____ F.2d ____ No. 90-5446, [Appendix cited as A3-A21] affirming in part and reversing in part a judgment of the United States District Court for the Western District of Kentucky, Civil Action No. C-89-0756(L)(A) (A21-A-25). The United States District Court had jurisdiction pursuant to 28 U.S.C. 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner has asserted that the constitutional and statutory provisions involved are as follow: (1) the due process clause of Section 1 of the Fourteenth Admendment of the Constitution of the United States and, (2) Title 28 U.S.C. 2254. The respondent agrees with the Petitioner.

COUNTER STATEMENT OF THE CASE

The Respondent, Ricky Harold Raley, filed an application for a writ of habeas corpus with the United States District Court for the Western District of Kentucky attacking his conviction in the Commonwealth of Kentucky as a Persistent Felony Offender. Mr. Raley asserted that the Commonwealth of Kentucky violated his right to due process because the Commonwealth did not produce sufficient evidence to establish clearly and convincingly that he knowingly and intelligently waived his rights when he pled guilty to prior criminal acts that were the basis for the Persistent Felony Offender conviction.

PROCEDURAL HISTORY

On May 28, 1987, the Respondent, Ricky Harold Raley, entered a conditional plea of guilty to charges of second degree robbery and first degree persistent felony offender. Before entering his plea, Mr.

Raley had motioned the trial court to suppress his prior convictions as evidence of persistent offender status and that motion was denied.

There were two prior convictions sought to be used as evidence by the prosecution to show proof of Respondent's persistent felony offender status. The first conviction was entered on January 3, 1980, in case No. 79-CR-1214 and imposed a sentence of five years on each count of a three count indictment for burglary. The second conviction was entered October 8, 1981, in case No. 81-CR-0269, and imposed a sentence of five years for third degree burglary, and of being a second degree persistent felony offender. The convictions were obtained in each of the above described cases as a result of guilty pleas.

The motion to suppress the introduction of these convictions into evidence was based upon Mr. Raley's claim that the pleas were not entered voluntarily. There was no evidence in the record that Mr. Raley waived his right to a jury trial, his right to remain silent, his right to confront witnesses against him, and/or other rights guaranteed to him under the United States Constitution.

A hearing was granted on Respondent's motion to suppress. At the hearing, the prosecution filed certain copies of the judgments in the 1979 and the 1981 cases. The trial court then advised Respondent

that this caused the burden of going forward to shift to him. Respondent submitted that under the precedents of the Kentucky Supreme Court, the trial judge correctly stated the law. However, Respondent advised the Court of his written motion which maintained that under federal law where the record is silent as to a colloquy between the defendant and the court pursuant to a guilty plea entered, the convictions are presumed constitutionally invalid. In order to comply with the Kentucky law, appellant then produced evidence through his own testimony. The prosecution, for its part, relied on cross-examination of the Respondent and on the testimony of one of the trial attorneys who had previously represented Respondent.

After the State trial court denied Mr. Raley's motion to suppress, he entered a conditional guilty plea in which he reserved the right to appeal the determination of the trial court concerning the motion to suppress the PFO conviction.

The Kentucky Court of Appeals affirmed Mr. Raley's conviction in a slip opinion rendered April 22, 1988. Raley v. Commonwealth, 87-CA-1359-MR, "Not to be Published". Relying upon Dunn v. Commonwealth, Ky., 703 S.W.3d 874, 876 (1985), cert. denied, 107 S.Ct. 121, the Kentucky Court of Appeals found that the trial court

properly placed the burden of production upon Mr. Raley. Relying on other cases, the Kentucky Court of Appeals concluded that the Commonwealth met its burden of proof concerning the validity of Mr. Raley's prior guilty pleas. The Dunn case was subsequently disapproved by the Sixth Circuit on federal habeas review, in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 108 L.Ed.2d 778.

The Kentucky Supreme Court subsequently denied review.

Mr. Raley thereafter filed a Petition for Habeas Corpus with the United States District Court for the Western District of Kentucky.

After ordering the record to be supplemented with additional documentation concerning the guilty pleas of 1979 and 1981, the United States District Court, Western District of Kentucky at Louisville, denied Mr. Raley's Petition for Habeas Corpus. Respondent filed his notice of appeal on March 21, 1990, and the United States District Court issued a certificate of probable cause that same day. Mr. Raley's case was then heard by the United States Circuit Court of Appeals for the Sixth Circuit, and a conditional Writ of Habeas Corpus was granted. The Commonwealth has now filed a petition for a Writ of Certiorari with this Court.

ARGUMENT

Mr. Raley contends that Boykin v. Alabama, 395 U.S. 238 (1969) and Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1538 (1990) required the Sixth Circuit to find that his plea was not entered knowingly and intelligently. Raley correctly argued that according to Boykin, because no transcript of either his 1980 or his 1981 plea proceedings exist, the Commonwealth thus has the burden to prove that he knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to remain silent. Boykin, 395 U.S. at 243. Mr. Raley also argued that in Dunn v. Simmons, supra, the Sixth Circuit established that a state may not carry its burden under Boykin by utilizing a presumption, and that any extrinsic evidence it offers must be clear and convincing. Dunn, Id. at 1277.

Mr. Raley concluded that Kentucky did not produce enough evidence to establish clearly and convincingly his knowing and intelligent waiver of his rights. The fact of the silent record, combined with his testimony, created a strong suggestion that he was not aware of his rights when he waived them.

Mr. Raley submits that the Sixth Circuit is correct in its decision in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990) and its decision herein. Raley v. Parke, ____ F.2d ____ (6th Cir. 1991). This case is squarely grounded upon the decision in Dunn v. Simmons. The Sixth Circuit in its opinion specifically states:

> "Our decision in Dunn governs the disposition of this case." (A12)

The court could not make itself more clear. The United States Supreme Court has denied certiorari of Dunn v. Simmons, and should likewise deny certiorari here.

THE WRIT SHOULD NOT BE GRANTED

Rule 17 of the Rules of Court for the Supreme Court of the United States sets forth the considerations to be weighed in determining if the Supreme Court should accept a case for review. Rule 17 is not controlling on this court, but it does reflect that review on a writ of certiorari is not a matter of right, but of judicial discretion, which will be granted when there are special and important reasons therefor.

The Respondent submits that there are no special and important reasons for reviewing the decision of the Sixth Circuit. The Sixth Circuit's decision is squarely based upon its previous decision in Dunn v. Simmons, which this court decided not to review in 1990.

The only issue being raised is whether the Sixth Circuit is correct in its finding that pursuant to Boykin v. Alabama the Commonwealth has the burden of proving previous convictions by clear and convincing evidence. This issue is not of great importance because the Circuits are not in conflict over this issue. Almost if not all of the cases cited by the Petitioner are irrelevant, dealing either with the burden of showing that a prior conviction should not be counted under the criminal history calculations of the guidelines or when issues in habeas proceedings differ from those examined in Boykin.

The Sixth Circuit in its opinion states:

> In habeas challenges to the validity of a guilty plea, however, courts uniformly assign to the state [after petitioner shows noncompliance with the requirements of Boykin] the burden of showing that the guilty plea was obtained constitutionally. Fox v. Kelso, 911 F.2d 563, 569 (11th Cir. 1990).

The Commonwealth asserts in its petition that a majority of the Circuits are in conflict with the Sixth Circuit's opinion in this case. The Respondent has read their petition and reviewed the cases cited

and fails to find what cases the Commonwealth relies upon for this statement.

The cases cited in its petition are substantially the same cases cited in its Brief to the Sixth Circuit except for twenty (20) or so cases from state courts and numerous cases from the Eleventh Circuit that are collected in Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990), the case cited by the Sixth Circuit in its opinion.

The Commonwealth attempts to show that the Sixth Circuit's reliance upon Fox v. Kelso is improperly placed and that the Ninth Circuit is in conflict with the Sixth Circuit by citing U.S. v. Pricepaul, 540 F.2d 417 (9th Cir. 1976) and U.S. V. Goodheim, 651 F.2d 1294 (9th Cir. 1981). This reliance is severely misplaced as the Ninth Circuit in Goodheim, reaches the same conclusion at which the Sixth Circuit arrived. In Goodheim, Id., at 1299, the Ninth Circuit stated:

> In Boykin, the Court held that a sate court may not constitutionally accept a guilty plea without an affirmative showing that the plea was voluntary and intelligent. 395 U.S. at 243, 890 S.Ct. at 1712. A silent record does not require automatic reversal; the government may prove that the plea was voluntary and intelligent at an evidentiary hearing. Wilkins v. Erickson, 505 F.2d 761, 764-65 (9th Cir. 1974). In Pricepaul, we reluctantly held a silent record sufficient both to rigger an evidentiary hearing and to

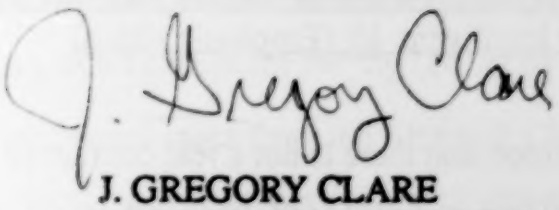
> shift the burden to the government to prove that the plea was voluntary and intelligent. 540 F.2d at 423. We further indicated that, had we not been constrained by Boykin, we would have preferred to require, in addition, an affidavit from the defendant specifically alleging that the plea was not voluntary or intelligent. Id. (Emphasis added)

It is submitted that there is not a real conflict of opinion between the Courts of Appeals as to the issues decided by the Sixth Circuit in Raley v. Parke. It has long been held that certiorari to review decisions of the United States Court of Appeals in cases such as this, are only granted where a "clash" of opinion in the Courts of Appeals requires settlement of questions by the Supreme Court. Universal Camera Corporation v. NLRB, (1951) 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456; Rice v. Souix City Memorial Park Cemetary, (1955) 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614; Goldlawn, Inc. v. Heiman, (1962) 369 U.S. 463, 8 L.Ed.2d 39, 82 S.Ct. 913; Fields v. United States, (1907) 205 U.S. 292, 51 L.Ed. 807, 27 S.Ct. 543.

This case does not involve a question of gravity and general importance. There is no great conflict between decisions of State and Federal Courts or between those of Federal Courts of different circuits and nothing affecting international relations. Rule 17 of the Rules of Court and the case law interpreting 28 U.S.C. 1254 indicate that certiorari should be denied.

WHEREFORE, it is submitted that the Petition for Certiorari filed herein should be denied.

Respectfully submitted,



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COUNSEL FOR RESPONDENT

Supreme Court, U.S.
FILED
APR 16 1992
OFFICE OF THE CLERK

No. 91-719

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN, - - - - Petitioner

versus

RICKEY HAROLD RALEY, - - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

Counsel of Record
for Petitioner:

CHRIS GORMAN
Attorney General

IAN G. SONEGO
Assistant Attorney General

DAVID A. SEXTON
Assistant Attorney General
Criminal Appellate Division
Capitol Building
Frankfort, Kentucky 40601
502-564-7600

Counsel of Record
for Respondent:

J. GREGORY CLARE
MULLOY, WALTZ, WETTER,
FORE & SCHWARTZ

First Trust Centre
Suite 700N
200 South Fifth Street
Louisville, Kentucky 40202

Petition for Certiorari filed October 30, 1991
Certiorari granted March 2, 1992

BEST AVAILABLE COPY

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
C-89-0756-L(A)

DATE	NR.	PROCEEDINGS
7/13/89		Applic. to proceed IFP tend.
9/19/89	1	ORDER (TAB) that Motion is granted and Petition is ordered filed. Respondent shall file an answer herein w/in 20 days from the date of entry of this order purs. to Rule 5, Gov. 2254 cases in the USDC. ccs: Pet., Resp., Atty. Gen., Comm. of Ky.
9/19/89	2	Complaint. Copies to all parties. w/memo in support
9/26/89		CERT mail retd. EX by CM 9/22/89 as to Attorney General.
9/26/89		CERT mail retd EX by CM 9/25/89 as to Al Parke, Warden.
10/04/89	3	ANSWER to habeas corpus petition w/ MEMO and attachments in support by resp. O/tend.
10/20/89	4	RESPONSE to Rule 5 answer to habeas corpus petition by petitioner.
1990		
01/05/90	5	ORDER (CMA) that w/in 20 days of dt of this order, Commonwealth shall provide Court w/cc of plea agmt forms executed by petitioner in connection w/his 1980 and 1981 convictions. rc: counsel and pro se pltf.
01/19/90	6	RESPONSE to 1/5/90 order by RESP.
03/15/90	7	MEMO (CMA) on request for writ. rc: couns and pro se pltf.

Relevant Docket Entries

DATE	NR.	PROCEEDINGS
03/15/90	8	JUDG (CMA) on memo this da that petition DENIED. Final and appeal, rc couns and pro se pltf.
03/21/90	9	NOTICE OF APPEAL by petr from order entered on March 15, 1990.
03/21/90	10	MOTION by petr. for cert. of prob. cause.
03/27/90	11	ORDER by (CMA) that mot. for cert of prob. causw be GRANTED cc: coun.
03/28/90		RECORD ON APPEAL FORWARDED TO USCA. cc: coun.

NOTATION REGARDING LOWER COURT OPINIONS

The opinions of the Kentucky Court of Appeals, United States District Court for the Western District of Kentucky, and United States Court of Appeals for the Sixth Circuit appear in the appendix to the petition for writ of certiorari and therefore pursuant to Rule 26.1 are not reproduced in this appendix.

THE COMMONWEALTH OF KENTUCKY

JEFFERSON CIRCUIT COURT

CRIMINAL DIVISION

79CR1214(2)

OCTOBER TERM A.D., 1979

THE COMMONWEALTH OF KENTUCKY
Against
RICKY HAROLD RALEY

Burglary I (Two Counts)	Burglary III
KRS 511.020 Class B Felony	KRS 511.040 Class D Felony
10 to 20 years	1 to 5 years

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 31st day of August, 1979, in Jefferson County, Kentucky, the above named defendant committed first-degree burglary by unlawfully entering or remaining in the dwelling of Ralph Calveard, with the intent to commit a crime.

COUNT TWO

That on or about the 31st day of August, 1979, in Jefferson County, Kentucky, the above named defendant committed first-degree burglary by unlawfully entering or remaining in the dwelling of Joe Goldman, with the intent to commit a crime.

COUNT THREE

That on or about the 31st day of August, 1979, in Jefferson County, Kentucky, the above named defendant com-

mitted third-degree burglary when he knowingly and unlawfully entered or remained in 5507 Mae Court, an uninhabited building, owned by Alden Goldsmith, with intent to commit a crime.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

A True Bill
(s) Ralph M. Brown
Foreman

WIT: Joe Goldman, 5509 Mae Court;
Alden Goldsmith, 5507 Mae Court
Ralph Calveard, 5506 Mae Court;

OFF: J. Clark, 0099; J. Hart, 1947, LPD

JEFFERSON CIRCUIT COURT

SECOND DIVISION

No. 79CR1214

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - *Defendant*

COMMONWEALTH'S RECOMMENDATION ON A PLEA OF GUILTY

---

1. CHARGE(S): PENALTY:

Burglary I	10 to 20 yrs.
Burglary II	10 to 20 yrs.
Burglary III	1 to 5 yrs.

2. FACTS OF THE CASE:

Defendant was caught breaking into garages at three addresses on Mae Court. Tools, fishing equipment were taken.

3. RECOMMENDATIONS ON A PLEA OF GUILTY:

Amend Count 1 and 2 to Burglary III with a plea of guilty to three counts of Burglary III with a sentence of five years to serve on each count.

4. REASON(S) FOR AMENDED CHARGE(S):

Facts
warrant

5. AGREED TO THIS 29th DAY OF NOVEMBER, 1979:

Commonwealth's Recommendation on a Plea of Guilty

/s/ William T. McIntyre
Assistant Commonwealth's Attorney

Approved by Division Chief

x /s/ Ralph O. Calvert
Prosecuting Witness

Police Officer

Prosecuting Witness

Police Officer

/s/ Ricky Raley
Defendant

/s/ Thom A. Marshall
Attorney for Defendant

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of Jefferson Circuit Court
Tony Miller, Clerk
By /s/ L. Roberts D.C.

COMMONWEALTH OF KENTUCKY

30TH JUDICIAL DISTRICT

JEFFERSON CIRCUIT COURT

SECOND DIVISION

CR. NO. 79CR1214 - - - - - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - - *Defendant*

PLEA OF GUILTY

The Defendant above named respectfully represents to the Court as follows:

1. My full name is Ricky Harold Raley and I request that all proceedings against me be had in the name which I here declare to be my true name.

2. My age is 23; Birth Date: 8-30-56.

3. I have completed 11 years of school.

4. I can speak and understand the English language.

5. I am not under the influence of alcohol or narcotics at this time.

6. I have never been treated for any mental disease, nor have I ever been admitted to a mental hospital.

7. I am represented by counsel and the name of my lawyer is Thom Marshall.

8. I have received a copy of the Indictment* before being called upon to plead, and have read the Indictment

---

*"Indictment" also includes "Information," as the case may be

and discussed it with my attorney and fully understand every charge made against me in this case.

9. I have told my attorney all the facts and surrounding circumstances as known to me concerning the matters. My attorney has since informed me and has counselled and advised with me at length as to the nature and cause of each accusation against me as set forth in the Indictment and as to any possible defenses I might have in this case.

10. My attorney has advised me as to the maximum punishment which the law provides for the offense charged in the Indictment, as follows: A maximum of 15 years imprisonment and a fine of $———— for the offense of Burglary 3rd (3) Charged in 79CR1214.

11. I understand that I may, if I so choose, plead "Not Guilty" to any offense charged against me, and that if I should choose to plead "Not Guilty" the Constitution guarantees me (a) the right to a speedy and public trial April, 1973

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Of Jefferson Circuit Court
Tony Miller, Clerk
By /s/ L. Roberts D.C.

by jury, (b) the right to see and hear all witnesses called to testify against me, (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor, and (d) the right to have the assistance of counsel for my defense at all stages of the proceedings.

12. I understand that if I plead guilty, I waive all of these rights, including the right of appeal.

13. I understand that I have a right not to incriminate myself, but I must waive this right if I plead guilty.

Plea of Guilty

14. I also understand that if I plead "GUILTY" the Court may impose the same punishment as if I had pleaded "NOT GUILTY", stood trial and been convicted by a jury and that the Court need not accept any recommendations as to sentence that may be made by the Commonwealth.

15. I understand that there can be no appeal from the Judgment of this Court.

16. I declare that no officer or agent of any branch of government (Federal, State or local) nor any other person, has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I would receive a lighter sentence, or probation, or any other form of leniency if I would plead "GUILTY".

17. I declare that no officer or agent of any branch of the government (Federal, State or local) nor any other person has used any force, duress or coercion to get me to plead "Guilty" or told me that I would receive a heavier sentence or been denied consideration for probation if I pleaded "Not Guilty" and subsequently was found "Guilty".

18. I am satisfied with the advice and counsel which my attorney has given me, and there is nothing about the proceedings in this case against me which I do not fully understand.

19. I have had all the time that I wanted to confer with my attorney, and I do not need to confer with him any further before we proceed.

20. I know that the Court will not permit anyone to plead "Guilty" who claims to be innocent and, with that in mind and because I am "Guilty" and make no claim of innocence, I wish to plead "Guilty" and respectfully request the Court to accept my plea of "Guilty" and to have the

clerk enter my plea of "Guilty" as follows: (*) Guilty as charged in Counts 1, 2 and 3.

21. I declare that I offer my plea of "Guilty" freely and voluntarily and of my own accord and with full understanding of all the matters set forth in the Indictment and in this petition and in the certificate of my counsel which is attached to this petition.

Signed by me in open Court in the presence of my attorney this 29th day of November, 1979.

/s/ Ricky Raley
Defendant

April, 1973

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Of Jefferson Circuit Court
Tony Miller, Clerk
By /s/ L. Roberts D.C.

(*) The Defendant's plea of "Guilty" or "Not Guilty" as to each offense charged against him in the Indictment should be entered in the blank space provided in paragraph 20. If the Indictment charges but a single offense, the Defendant who wishes to plead "Guilty" should write in paragraph 20 "Guilty as charged in the Indictment." If more than one offense be charged, the Defendant may write in paragraph 20 the words: "Guilty as charged in Count _____ of the Indictment," etc. "Not Guilty as charged in Count _____, etc."

CERTIFICATE OF COUNSEL

The undersigned, as attorney and counsellor for the Defendant above named /s/ Ricky Harold Raley hereby certifies as follows:

1. That I have read and fully explained to the Defendant the allegations contained in the Indictment in this case.

2. That I have fully explained the Defendant's Constitutional rights to him.

3. That to the best of my knowledge and belief the statements and representations and declarations made by the Defendant in the foregoing petition are in all respects accurate and true.

4. That the plea of "GUILTY" as offered by the Defendant in paragraph 20 of the foregoing petition accords with my understanding of the facts as related to me by the Defendant and is consistent with my advice to the Defendant.

5. That in my opinion the plea "GUILTY" as offered by the Defendant in paragraph 20 of the foregoing petition is voluntarily and understandingly made, and I recommend to the Court that the plea of "GUILTY" be now accepted and entered on behalf of the Defendant as requested in paragraph 20 of the foregoing petition.

Signed by me in open Court in the presence of the Defendant above named and after full discussion of the contents of this certificate with the Defendant, this 29th day of November, 1979.

/s/ Thom A. Marshall
Attorney for Defendant

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Of Jefferson Circuit Court
Tony Miller, Clerk
By /s/ L. Roberts D.C.

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH
SECOND DIVISION

Indictment No. 79 CR 1214

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - *Defendant*

Representing the Commonwealth: Wm. McIntyre
Representing the Defendant: D. O'Brien or T. Marshall

These Proceedings Made of Record by Office Court Reporter: yes
The Defendant Having Executed Bail
Being Held In Lieu of Bail

ORDER

At a Court held: Nov. 29, 1979

Came the defendant(s) and counsel and withdrew his/their former plea(s) of not guilty and now pleads guilty to 3 cts of Burglary III.

By consent, the law and facts of this case were presented to the Court without the intervention of a jury; the Court being advised and, on recommendation of the Commonwealth's Attorney and, by agreement of the defendant in person and by counsel, finds the defendant(s) guilty per the plea(s) entered herein. Comes counsel and orally moves the Court to withhold the rendition of the judgment and to place the defendant(s) on probation or conditional

release. The Court not being advised, ordered said motion(s) be and is/are assigned to 1/3/80 @ 9am for filing of the pre-sentence investigative report and for the Court's ruling on said motion(s). It is ordered that the defendant(s) bond be increased to $10,000.00 and he is remanded to custody.

Attested: A True Copy
Paulie Miller, Clerk
By /s/ D.C.

/s/ Oldham
Judge

Certified Copy of Record
Of Jefferson Circuit Court
Tony Miller, Clerk
By /s/ L. Roberts D.C.

JEFFERSON CIRCUIT COURT

SECOND DIVISION

No. 79 cr 1214

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - *Defendant*

JUDGMENT OF CONVICTION AND SENTENCE

The defendant, Ricky Harold Raley, having this day appeared in open court with his attorney, Hon. D. O'Brien, and the defendant having requested a pre-sentence investigation report and it having been delivered to the Court and exhibited to the defendant and his counsel, and today the defendant and his attorney and the attorney for the Commonwealth appearing before the Court for the purpose of the Court's consideration of the pre-sentence investigation report of the defendant, and the Court's fixing of punishment and imposition of sentence upon the defendant; and the Court having duly considered the contents of the pre-sentence investigation report made of the defendant by the Probation Officer and having permitted the defendant and his counsel to review and fully acquaint themselves with the contents of said report in its entirety, and no request having been made by defendant or his counsel to controvert the factual contents or conclusions of the pre-sentence investigation report;

And

The Court having fully considered the possibility of probation and conditional discharge of the defendant and

after due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the public because:

(a) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; and

(b) a disposition of the defendant by probation or conditional discharge will unduly depreciate the seriousness of the defendant's crime;

AND

The Court having inquired of the defendant and his counsel whether they had any legal cause to show why judgment and sentence should not be pronounced against the defendant; further, the Court having afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of the punishment and no legal cause having been shown why judgment and sentence should not be pronounced against him; it is, therefore,

ORDERED AND ADJUDGED by the Court as follows:

That the defendant, Ricky Harold Raley, is guilty of the offense(s) of Burlary III, committed on 8/31/79, as charged in the Indictment and his punishment therefore is fixed at 5 years on each of 3 cts to run concurrently; accordingly, he is hereby sentenced to and ordered committed to the custody of Dept. of Corrections, for a term of 5 years and until released in accordance with the law.

It is further ORDERED AND ADJUDGED that the Sheriff of Jefferson County shall deliver the defendant to the custody of the Dept. of Corrections, at his earliest convenience at

such location within this state as the Department shall designate for the purpose of the defendant's executing the sentence imposed upon him hereunder, and the defendant is now remanded to the custody of the Dept. of Corrections, there to remain and be securely kept, until he can be transported to the custody of the Dept. of Corrections, as hereinbefore provided.

ENTERED this 3 day of January, 1980.

Seen And Notice Of Entry
Waived By:
Attorney for the Defendant
Attorney for the Commonwealth

Oldham
Judge, Jefferson Circuit Court

Filed and Notice of Entry given,
this the 3rd day of January, 1980.

P. Miller, Clerk.
By: A. Darnice?? D.C.

JEFFERSON CIRCUIT COURT

LOUISVILLE, KENTUCKY

79CR1214-2

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - *Defendant*

JUDGMENT—January 3, 1980

On Indictment No. 79CR1214-2

On the charge of _____

Cts 1, 2, 3 Burglary III

COURT COSTS $50.00

Said Sentence Shall Run In Accordance With The Provisions Of KRS 533.060, If Applicable

The defendant was this day brought into court, was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advice of counsel, none being shown, it is adjudged that the defendant, being 23 years of age, be taken by the Sheriff of Jefferson County, to the jail of Jefferson County and from there by the Sheriff or said County transferred to the custody of the Department of Corrections and to remain in their custody for the period of not more than 5 years each Ct. co years or _____. The Sheriff or said County shall transfer the defendant to the custody of the Department at such location as the Department shall designate.

(If this sentence is to run concurrently or consecutively with any other sentence, please complete the following).

Judgment

This sentence is to run concurrent with the sentence(s) of Indictment No. 79CR1214 of the Jefferson Circuit Court.

I, Paulie Miller, Clerk of the Jefferson Circuit Court, do certify the foregoing judgment is a true and correct copy of the judgment in the above styled case, entered on January 3, 1980, in the Circuit Court 2 Circuit Court and spread upon the Order Book at page ——.

Witness my hand as Clerk of the Jefferson Circuit Court this Jan. 3, 1980.

Certified Copy of Record
Of Jefferson Circuit Court
Tony Miller, Clerk
By D.C.

Paulie Miller Circuit Court Clerk
By: /s/ N. E. Kirken

JEFFERSON CIRCUIT COURT

DIVISION EIGHT

No. 81CR0269

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - *Defendant*

COMMONWEALTH'S RECOMMENDATION ON A PLEA OF GUILTY

---

1. CHARGE(S)	PENALTY:
Burg. III	1-5 yrs
PFO II	Indeterminate
Complicity	
RSP o/100	1-5 yrs

2. FACTS OF THE CASE:

Defendant participated in the burglary of the Leatherhead Shop on Jan. 6, 1981. Approximately $3,000 worth of clothing was taken.

3. RECOMMENDATIONS ON A PLEA OF GUILTY:
PG Burg III - 5 yrs. enhanced to 5 yr on PFO II; Dism Complicity & RSP o/100.

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Of Jefferson Circuit Court

/s/ Tony Miller
By M. Ballard D.C.

Commonwealth's Recommendation on a Plea of Guilty

4. REASON(S) FOR AMENDED CHARGE(s):

5. Agreed To This 8th Day of October, 1981:

/s/ Grimes

Assistant Commonwealth's Attorney

Approved by Division Chief

/s/ CW O'Brien

Prosecuting Witness — Police Officer

/s/ Charles N. Jones

Prosecuting Witness — Police Officer

/s/ Ricky Raley — /s/ Thomas E. Clay

Defendant — Attorney for Defendant

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Of Jefferson Circuit Court
/s/ Tony Miller
By /s/ M. Ballard D. C.

JEFFERSON CIRCUIT COURT

DIVISION EIGHT

Indictment No. 81 CR 0269

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - *Defendant*

Representing the Commonwealth: William Grimes

Representing the Defendant: Thos. Clay

Official Court Reporter: Margie McKinley

The Defendant Having Executed Bail XXX

Being Held in Lieu of Bail _____

ORDER

At a Court held: October 8, 1981 comes the Defendant, in person and by counsel, and withdraws the former plea of not guilty and now pleads guilty to Count I - Burglary III recmds 5 yrs and to Count XI PFO II enhanced to 5 yrs PFO II. By consent, the law and facts of this case were presented to the court without the intervention of a jury; the court, being advised, on the recommendation of the Commonwealth's Attorney, and agreed to by the defendant, in person and by counsel, finds the defendant guilty as per the plea and fixes punishment at Five years in the penitentiary. Comes the Defendant, in person and by counsel, and orally moves the Court to withhold the rendition of the judgment herein; the court, not being advised, ordered that

this motion be and is passed to October 29, 1981 9:15 am for filing of the presentence report and ruling on said motion. IT IS ORDERED by the Court that the defendant may remain on same bond of $5000.00 10%

(s) Henry D. Hopson
Henry D. Hopson, Judge

JEFFERSON CIRCUIT COURT

DIVISION EIGHT

No. 81 CR 0269

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - *Defendant*

JUDGMENT AND CONVICTION AND SENTENCE

The Defendant, Ricky Harold Raley having this day appeared in open court, with his attorney, Thos. Clay and Larry Simon having appeared as attorney for the Commonwealth for the purpose of the Court's consideration of the pre-sentence investigation report of the Defendant, and the Court's fixing of punishment and imposition of sentence upon the Defendant, and the Defendant having heretofore on October 8, 1981 entered into a plea of guilty, and the Court having duly considered the contents of the pre-sentence investigation report made of the Defendant by the Probation Officer and having permitted the Defendant and his counsel to review and fully acquaint themselves with the contents of said report in its entirety:

AND

The Court having fully considered the possibility of probation and conditional discharge of the Defendant and after due consideration of the nature and circumstances of the crime and the history, character and condition of the Defendant, the Count is of the opinion that imprisonment is necessary for the public because:

Judgment and Conviction and Sentence

(a) The Defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution.

AND

(b) A disposition of the Defendant by probation or correctional discharge will unduly depreciate the seriousness of the Defendant's crime:

AND

The Court having inquired of the Defendant and his counsel whether they had any legal cause to show why judgment and sentence should not be pronounced against the Defendant, further the Court having afforded the Defendant and his counsel an opportunity to make statements in the Defendant's behalf and to present any information in mitigation of the punishment and no legal cause having been shown why judgment and sentence should not be pronounced against him in accordance with his/her Plea of Guilty.

IT IS THEREFORE ORDERED AND ADJUDGED by the Court as follows:

That the Defendant, Ricky Harold Raley is guilty of the offence(s) of Burglary III enhanced to PFO II Complicity and RSP over $100.00 dismissed committed on or about January 6, 1981, as charged in the indictment and his punishment therefor is fixed at Five Years in the penitentiary, he/she is hereby sentenced and ordered committed to the custody of Kentucky Department of Corrections, for a term of Five Years, on said count(s), and until released in accordance with the law.

IT IS FURTHER ORDERED AND ADJUDGED that the Sheriff of Jefferson County shall deliver the Defendant to the custody of the Jailer of Jefferson County, at his earliest convenience at such location within this state as the Depart-

ment shall designate for the purpose of the Defendant's executing the sentence imposed upon him/her hereunder, and the Defendant is now remanded to the custody of the Jailer of Jefferson County, there to remain and be securely kept until he can be transported to the custody of the Kentucky Department of Corrections as hereinbefore provided.

IT IS FURTHER ORDERED by the Court that the court costs of $50.00 be paid on or before the Defendant's release.

Entered this 29th day of October, 1981.

(s) Henry D. Hopson
Henry D. Hopson, Judge

JEFFERSON CIRCUIT COURT

LOUISVILLE, KENTUCKY

No. 81CR0269-8

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY HAROLD RALEY - - - - - *Defendant*

JUDGMENT—October 29, 1981

On Indictment No. 81CR0269-8
On the charge of———————
Burglary III enhanced to PFO II
5 years

The defendant was this day brought into court, was asked if he had any legal cause to show why judgment should not be pronounced against him; upon advice of counsel, none being shown, it is adjudged that the defendant, being 23 years of age, be taken by the Sheriff of Jefferson County, to the jail of Jefferson County and from there by the Sheriff of said County transferred to the custody of the Department of Corrections and to remain in their custody for the period of not more than 5 years or———. The Sheriff of said County shall transfer the defendant to the custody of the Department at such location as the Department shall designate.

(If this sentence is to run concurrently or consecutively with any other sentence, please complete the following)

This sentence is to run ———————————
(concurrently / consecutively)
with the sentence(s) of Indictment No.———— of the Jefferson Circuit Court.

Judgment

I, Paulie Miller, Clerk of the Jefferson Circuit Court, do certify that the foregoing judgment is a true and correct copy of the judgment in the above styled case, entered on 29 October, 1981, in the Circuit Court 8 Circuit Court and spread upon the Order Book at page ——— Witness my hand as Clerk of the Jefferson Circuit Court this October 29, 1981.

——————— Circuit Court Clerk

By: /s/ ——————————— —D. C.

JEFFERSON CIRCUIT COURT

FIFTEENTH DIVISION

No. 86-CR-0796

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKEY RALEY - - - - - - - *Defendant*

TRANSCRIPT OF PROCEEDINGS ON DEFENDANT'S PLEA OF GUILTY

HEARD BEFORE the Honorable Benjamin Shobe, Judge, on the Twenty-Eighth day of May, 1987.

For the Commonwealth: David Bybee
For the Defendant: Mark Wettle

The Court: The Court has before it Indictment No. 86-CR-0790, Commonwealth of Kentucky versus Rickey Harold Raley. Mr. Raley is charged with Robbery in the First Degree, Persistent Felony Offender in the First Degree, and Mr. Wettle, you represent him, do you not?

Mr. Wettle I do, Your Honor.

The Court: And, is he the gentleman standing to your left?

Mr. Wettle: He is, Your Honor.

The Court: Mr. Bybee, you

represent the prosecution, do you, sir?

Mr. Bybee: I do.

The Court: And, is there a negotiated settlement of the case, sir?

Mr. Bybee: Yes, there is.

The Court: May I know its terms, sir?

Mr. Bybee: Yes, sir. Mr. Raley is charged with Robbery, One and PFO, One. The Commonwealth has agreed to amend the Robbery, One to Robbery, Two, and recommend five (5) years, and then increase the Robbery, Two charge to PFO, One, ten (10) years.

The Court: All right, sir. Is that the agreement, sir?

Mr. Wettle: Yes, Your Honor. We're entering our plea. It's a conditional plea pursuant to RCR 809, but reserving the right to appeal the determination of this Court in regards to our motion on the PFO.

The Court: All right, sir. The agreement between the prosecution and the defense as to the disposition of this case is accepted by the Court. You have, of course, advised your client of his rights?

Mr. Wettle: Yes, Your Honor.

The Court: As a matter of fact, you've signed a certificate to that effect, have you not,

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sir?

Mr. Wettle: I've signed many of them, Judge, and I've signed that one.

The Court: And this one, you did not sign without really doing it, without really advising him?

Mr. Wettle: I did, Your Honor.

The Court: All right. Is he sufficiently advised of the circumstances to discuss his plea with the Court?

Mr. Wettle: In my opinion, he is, Judge.

The Court: All right, sir. How does he now wish to plead?

Mr. Wettle: Your Honor, in conformity and in reliance upon the Commonwealth's recommendations, Mr. Raley wishes to change his former pleas of not guilty to guilty.

The Court: All right. Mr. Raley, you've heard — excuse me just one second.

(OFF THE RECORD.)

The Court: Mr. Raley, you've heard your attorney say to me that he's advised you of your rights —

The Defendant: Yes, sir.

The Court: And I believe he

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has.

The Defendant: Yes, sir.

The Court: And, you've filed with the Court, have you not, a Waiver of further proceedings with a petition to enter a plea of guilty?

The Defendant: Yes, sir.

The Court: And you acknowledge here in open court, do you, sir, that this is your signature?

The Defendant: Yes, sir.

The Court: And, the statements —

The Defendant: Yes, sir.

The Court: — statements on this form are your statements?

The Defendant: Yes, sir.

The Court: All right, sir. I see by this form, for example, that you're thirty years old and your social security number is 403-84-9470, is that correct?

The Defendant: Yes, sir.

The Court: And, you've completed eleven years of school?

The Defendant: Yes, sir.

The Court: All right, sir, and your age at the commission of the offense charged in the Indictment was twenty-nine. Is that correct, sir?

The Defendant: Yes, sir.

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The Court: All right, sir, and your lawyer has told you that the maximum punishment which the law provides for the offense charged in the Indictment is twenty (20) years imprisonment?

The Defendant: Yes, sir.

The Court: All right, and various other matters that are included herein, these are your answers, your statements?

The Defendant: Yes, sir.

The Court: All right, sir. You're not now under the influence of alcohol, narcotics or drugs?

The Defendant: No, sir.

The Court: And, you don't suffer any mental disability of any type, do you, sir?

The Defendant: No, sir.

The Court: You've never been treated by a doctor for any mental disease or disorder?

The Defendant: No, sir.

The Court: And, you've never been a patient in a mental institution, is that correct?

The Defendant: Yes, sir.

The Court: All right, sir. It becomes the duty, then, of the Court to advise you that you have a right to remain silent. You don't have

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to say anything which would tend to incriminate you. Further, you have a right to confront or to see, hear and have cross examined any witnesses who might appear

against you at trial. You have a right to a jury trial. You do not have to plead guilty. If you should elect to plead not guilty, then, before you can be found guilty, the Commonwealth would have the burden of proving that you're guilty beyond a reasonable doubt to the satisfaction of a jury. You have a right to bring witnesses to Court to testify on your own behalf, and if — to use the processes of the Court to require those witnesses to be present. If you plead guilty, however, you give up these rights. Do youn understand that, sir?

The Defendant: Yes, sir.

The Court: Do you have any questions you want to ask me about that?

The Defendant: No, sir.

The Court: All right, sir, if you plead guilty and get a sentence from the Court by virtue of pleading guilty on that particular Count 1 of this Indictment, is what we're talking about right now, the Robbery charge, if you plead guilty, you can't appeal that to another court or to another judge. Do you understand that, sir?

The Defendant: Yes, sir.

The Court: The Court understands that you have reserved certain rights to appeal

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the Persistent Felony Offender determination, which we had here in a prior hearing to determine the validity of your prior pleas of guilty. I understand that.

The Defendant: Yes, sir.

The Court: But, you understand that you can't appeal the conviction of Robbery in the Second Degree, I believe, is what you're pleading guilty to. Do you understand you can't appeal that?

The Defendant: Yes, sir.

The Court: All right, if you plead guilty to it. All right, sir, then the Court is informed that this act was committed when you — it says you robbed Bertha Kild by taking her purse by force. You understand that that's the charge against you?

The Defendant: Yes, sir.

The Court: All right, sir, and is that what you're pleading guilty to?

The Defendant: Yes, sir.

The Court: Is that because you are guilty of it?

The Defendant: Yes, sir.

The Court: Not because of any promises that have been made to you, not because of any threats that have been made against you, but simply because you are guilty?

The Defendant: Yes, sir.

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The Court: All right. Are you satisfied with the advice which you've received from your attorney?

The Defendant: Yes, sir.

The Court: Do you feel that Mr. Wettle has given your case his consideration and time and has done whatever he could in your behalf?

The Defendant: Yes, sir.

The Court: All right, sir. Do you have any complaints about this proceeding?

The Defendant: No.

The Court: All right. You know, of course, that this sentence is a sentence which you will have to serve, assuming that — You have to serve it if you're pleading guilty to being a Persistent Felony Offender, under these circumstances, even though that possibility could be changed?

The Defendant: Yes, sir.

The Court: You understand that the sentence being given to you now is a sentence to serve?

The Defendant: Yes, sir.

The Court: All right, sir. Do you still want to plead guilty?

The Defendant: Yes, sir.

The Court: All right. The Court determines, then, that the Defendant's determination

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to plead guilty is made intelligently and with full knowledge of the nature and consequences of his plea. Therefore, sir, your plea of guilty is accepted. May I know your birthdate?

The Defendant: 8-30-56.

The Court: All right. Are there any motions which you wish to make, Mr. Wettle?

Mr. Wettle: Judge, at this time, since Mr. Raley is not eligible for probation, and he's currently serving — he is currently out at Lagrange, we would ask today to waive the pre-sentence investigation, waive the separate sentencing hearing and ask the Court to sentence Mr. Raley according to the Commonwealth's recommendation.

The Court: All right. Let me ask this gentleman. This is silent. The recommendation is silent as to whether or not this sentence is to be served concurrent or consecutive to any sentence which he is now serving.

Mr. Bybee: Well, he's a — was a parole violator, correct?

Mr. Wittle: Parole violator, that's correct Judge. He is now committed to do sentence.

Mr. Bybee: He was out on parole when this occurred, correct?

Mr. Wettle: Correct.

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Mr. Bybee: That means it has to run consecutively.

Mr. Wettle: Under my understanding of Kentucky law.

The Court: All right.

Mr. Wettle: We would ask, however, he was incarcerated solely on this charge for a number of months and we'd ask that the Department of Probation & Parole calculate credit time served.

The Court: We'll give him any proper credit for time served on this charge. However, the record shall not remain silent as to whether or not this sentence will be served concurrently or consecutively. It will be served consecutive to any parole violation which he is now serving. You understand that, sir?

The Defendant: Yes, sir.

The Court: All right. Now, you were about to tell me, then, I believe, that he wishes to be sentenced today. Is that correct?

The Defendant: Yes, Your Honor. I've explained to Mr. Raley the importance of a pre-sentence investigation and a separate sentencing hearing. Understanding that, he wishes to waive his right to the preparation of a PSI and to a separate sentencing hearing and be sentenced today.

The Court: All right. Do you

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understand, then, Mr. Raley, that the Court would be required to secure a pre-sentence report before sentencing you unless you ask me not to get it?

The Defendant: Yes, sir.

The Court: And, that it may contain some information which you would disagree with and this would be your

chance to correct it, that information. Nevertheless, you want to be sentenced today?

The Defendant: Yes, sir.

The Court: All right. Is there any reason then why sentence should not be pronounced?

Mr. Wettle: No, Your Honor.

The Court: Hearing none, it is the judgment of the Court you've pled guilty, sir, to Robbery in the Second Degree. The Court finds you guilty and fixes your punishment at five years (5) in the Kentucky Department of Corrections, enhanced to ten (10) years on the count charging you with being a Persistent Felony Offender in the Frist Degree, to which you have also pled guilty under the reservation made. You will be taken by the Sheriff to the Kentucky Department of Corrections to serve that sentence, subject to the laws of Kentucky, and with credit for any time that you've served in this case while awaiting its disposition. All right.

The foregoing proceedings on the Defendant's plea of guilty are a true and accurate copy hereof.

(s) W. Lee Spencer
W. Lee Spencer,
Official Court Reporter
Date 6-26-87

Transcript of Proceedings on Defendant's Plea of Guilty

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON

I, PAULIE MILLER, Clerk of the Jefferson Circuit Court, do hereby certify that the foregoing Seventy (70) Pages constitute a full, true and complete Original Record in a certain cause entitled therein COMMONWEALTH OF KENTUCKY, Plaintiff, vs. RICKY HAROLD RALEY, Defendant No. 86 CR 0790.

I further certify the Transcript of Proceedings, heard May 28, 1987 and filed August 13, 1987 is hereby made a part of the record on appeal.

WITNESS my hand and official seal of said court this 14th day of August, 1987.

(s) Paulie Miller
Clerk Jefferson Circuit Court

JEFFERSON CIRCUIT COURT

DIVISION FIFTEEN

No. 86-CR-0790

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY RALEY, - - - - - - - - *Defendant*

TRANSCRIPT OF PROCEEDINGS

May 28, 1987

Louisville, Kentucky

W. Lee Spencer

Official Court Reporter

JEFFERSON CIRCUIT COURT

DIVISION FIFTEEN

No. 86-CR-0790

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICKY RALEY, - - - - - - - - *Defendant*

HEARD BEFORE the HONORABLE BENJAMIN SHOBE, Judge Jefferson Circuit Court, Division Fifteen, an May 28, 1987.

APPEARANCES

Counsel for the Plaintiff: Mr. David Bybee
Counsel for the Defendant: Mr. Mark Wettle

W. Lee Spencer
Official Court Reporter

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The Court: All right. In Indictment 86-CR-0790, Mr. Raley is charged with Robbery in the First Degree, and with being a Persistent Felony Offender in the First Degree. The Defendant has filed a motion for the — it's the motion to suppress prior convictions. The Commonwealth has presented to the Court a copy of a Final Judgment of the Jefferson Circuit Court in Indictment No. 81-CR-0269, wherein the Defendant was charged with Burglary in the Third Degree enhanced to Persistent Felony Offender in the Second Degree, and received a sentence of — enhanced by being a Persistent Felony Offender in the Second Degree — received a sentence of five (5) years on October 29th — entered on October 29th, 1981, also signed by the Judge of the Eighth Division, and do you recognize that signature on there?

Mr. Bybee: That would be Henry Hopson's signature.

The Court: Oh, it was Judge Hopson's signature. All right, and Indictment No. 79-CR-1214, a certified copy of the record, wherein the Defendant, Ricky Raley, on the 3rd day of January, 1980, by Judgment entered, signed by Judge Oldham of the Jefferson Circuit Court, found the

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Defendant guilty of Burglary in the Third Degree and fixed his punishment at five (5) years on each of three counts, to run concurrently. The Court, of course — these copies may be — are these copies? These are certified copies of the record, and they may be filed in this instance. Do you wish to enter these, Mr. Bybee —

Mr. Bybee: Yes, sir, I do.

The Court: — in the record as your evidence. I believe that then places the burden upon the Defendant to go forward.

Mr. Wettle: That's correct, Judge. Under — It's my understanding that the current case law regarding Persistent Felony Offender challenges in Kentucky, under both *Commonwealth* v. *Dunn* and *Commonwealth* v. *Gadd*, once the Commonwealth has submitted judgments, then there's the presumption under Kentucky law the judgments were correct, and therefore, the burden shifts to us to challenge any constitutional errors —

The Court: That's correct.

Mr. Wettle: — in the entrance of those judgments. We have previously filed a motion with this Court on November the 11th, which I believe the Court cited, a motion to dismiss Count

2 of the Indictment, and in that motion and writing, we cite the grounds why Indictment 81-CR-0269 and Indictment 79-CR-1214 are insufficient to reflect that Mr. Raley at those times entered a knowing and voluntary plea. At this time, we maintain under the Supreme Court of *Boykin v. United States* that both these cases contain silent records as to whether the Court entered into colloquy with Mr. Raley to ascertain whether his pleas were knowing and voluntary, and under Federal law, if these are constitutionally invalid. However, my understanding of the present Kentucky law is that Kentucky follows a totality of the circumstances standard, and therefore, we must sumbit some type of proof to establish that the plea — other than the fact that there is a silent record, to establish that these were not knowing and voluntary pleas, and therefore, to satisfy the burden of Kentucky law, we would call one witness and that would be Mr. Raley.

The Court: Come around, Mr. Raley.

The witness, RICKY RALEY, after having been first duly sworn, was examined and testified as follows:
(Direct - Mr. Wettle)

Q. Mr. Raley, for the record,

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would you just tell us your full name and where you're currently living?

A. My name is Ricky Harold Raley and I live at 426 Chickapee.

Q. And where are you presently residing at this time?

A. Kentucky State Reformatory.

Q. Okay, and is that in Lagrange, Kentucky?

A. Yes, sir.

Q. And, have you been a native of Jefferson County for most of your life?

A. Yes, sir.

Q. Where did you go to school?

A. Iroquois High School.

Q. And, what grade did you last finish at Iroquois High School?

A. The eleventh.

Q. And, what year was that?

A. Around '73, I believe, or 4.

Q. How old are you now?

A. Thirty.

Q. How old were you when you finished high shcool?

A. Around eighteen.

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Q. Taking you up to 1979, Mr. Raley, do you recall how old you were in 1979?

A. Around twenty-three, I believe.

Q. Previously to 1979, had you ever been arrested before?

A. Yes, sir.

Q. How many times had you been arrested before 1979?

A. Before '79?

Q. Yes.

A. Twelve - fifteen times for public intoxication.

Q. And for these arrests, the public intoxication, had you ever stood trial before 1979?

A. No, sir.

Q. Do you recall what the disposition of most of those public intoxication cases were?

A. A fine.

Q. In what court were these cases in, if you can recall?

A. It was in district. I really can't recall which specific ones.

Q. Do you ever recall an occasion when you were in District Court on P.I. cases, of the Judge informing you of anything when you entered any type
of plea?

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A. Just if I was under any toxicants or anything of that nature when I entered a plea of guilty.

Q. Anything else, can you recall?

A. No, sir.

Q. Did they ever impose a jail sentence upon you?

A. No.

Q. What were the amount of the usual fines that they would impose on you, if you recall?

A. Around $107.50, something like that.

Q. Taking you up to 1979, do you recall being in Division Two of Jefferson Circuit Court in 1979?

A. Yes, sir.

Q. Do you recall who the Judge was?

A. No, sir.

Q. Would the name, Richard Oldham, help?

A. Oh, yes, yes.

Q. Do you recall what you were in that Court for?

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A. Burglary, two counts. There's three counts of Burglary, total.

Q. Okay. Had you ever been in Circuit Court before this time?

A. No, sir.

Q. Had you ever been charged with a felony, before?

A. No,sir.

Q. Did you have a lawyer in this case in Division Two?

A. Yeah. Yes, sir.

Q. Do you recall what youd lawyer's name was?

A. He was a public defender.

Q. Can you recall if it was Thom Marshall? Does that name ring a bell with you?

A. I believe that's who it was, yeah, sounds familiar.

Q. Were you in custody on these charges up until — Did you have — Let me ask, first. Did you enter a guilty plea or did you have a trial?

A. I entered a guilty plea.

Q. Okay. Do you recall what day you entered that guilty plea?

A. No, sir.

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Q. Do you recall —

A. It was around January the 2nd or 3rd, I believe, of '79.

Q. Was Mr. Marshall still your attorney at this time?

A. Yes, sir.

Q. Did you have the same attorney throughout?

A. Yes, sir.

Q. And, did you remain in jail while you were awaiting trial?

A. Yeah. Yes, sir.

Q. How long were you in jail before trial, do you recall?

A. I came in, I believe it was, in August. Around four months, I'd say.

Q. The day you entered your plea, was your case set for trial that day, do you recall, or when was it set for?

A. I'm not really sure what it was set for. I would say it was set for trial day. I can't remember if it was normally set up for that.

Q. Do you ever remember discussing with Mr. Marshall entering a guilty plea?

A. Not until the Judge had read

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me out my charges and told me that the charges that I had could carry up to thirty-five or forty years, and so, Mr. Marshall there at the table had —

Q. Now, where is this occurring? Do you recall?

A. In the Court Room.

Q. Okay. Go on.

A. In front of the Judge's bench, and he told me that he probably would run all the charges together and give me a total of fifteen years and run them together, but there wasn't no guarantee. So —

Q. Was this Judge Oldham that told you that? Do you recall?

A. Yes, sir.

Q. Okay. Go on.

A. So, Mr. Oldham asked me how did I plea, and I told him "guilty". I made a plea of guilty, and he therefore said, "I sentence you to fifteen years to be served in Ken-

tucky State Reformatory", and then said he was going to run them concurrent, to give me a total of five years to serve.

Q. When Judge Oldham told you this, you could get up to thirty-five or forty years, did he explain to you how you could get up to thirty-five or forty years, or do you recall?

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A. No, he just said that my charges, the three Burglaries I had, could get up to that high. He didn't —

Q. Do you remember going over any papers with Mr. Marshall and Judge Oldham?

A. No, sir.

Q. Do you remember signing your name to anything?

A. Just that day that I pled guilty, that was —

Q. What do you recall you signed your name to?

A. A guilty plea for a total of five years.

Q. Okay. Do you recall reading over those papers?

A. No, I just — the part where they had my charges on it. That was all.

Q. Do you recall what the paper said besides what your charges were?

A. No.

Q. Do you recall if Judge Oldham told you anything?

A. Just asked me was that my signature and I said "Yes", and he wanted to know if I was

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forced by anyone or threatened or promised by anyone or under any intoxicants or medication while I was making that decision and I informed him that I hadn't been, and that's when he said "I therefore sentence you to fifteen years to run concurrent, to five years to serve in the Kentucky State Reformatory."

Q. Okay. Do you recall if he sentenced you that day or if you had a separate sentencing date?

A. That there was the sentencing day.

Q. Mr. Raley, before you entered this plea before Judge Oldham, had you ever had a trial of any sort?

A. No, sir.

Q. Before a Judge or before a jury?

A. No, sir.

Q. Had you ever attended a jury trial as a witness or a spectator?

A. No, sir.

Q. Had you ever seen an actual trial on TV or anything such as that?

A. Just a show, but I never paid that much attention to it, no.

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Q. Did they bring in a jury on this day? On the day you entered the plea, was there a jury there or anything?

A. No, sir.

Q. Or any jury selection begun before you pled guilty, if you can recall?

A. Not as I can recall, no.

Q. Do you recall the Judge informing you of any rights you might be giving up?

A. No, sir.

Q. Do you recall if Mr. Marshall informed you of any rights you might be giving up?

A. No, sir.

Q. Do you recall on any of your other pleas when you pled to P.I. in District Court and you received those fines, have any of those judges informed you that you had certain rights?

A. There were a few of them, I'd say. I could get up, say — I don't think it had anything to do with the rights. It was more or less I could get so many days in jail for this additional charge or something. That's about all.

Q. Did they explain anything else to you?

A. No.

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Q. What happened after you entered your plea and were sentenced?

A. In —

Q. In Division Two in 1979?

A. I had went down to Kentucky State Reformatory, and therefore, I went to Western Kentucky Farm Center.

Q. Okay, but you went to the Reformatory?

A. Yes, sir.

Q. Okay. Taking you up to 1981 when you entered your plea before Judge Hopson, do you recall that?

A. Yes, sir.

Q. That was in Division Nine of the Jefferson Circuit Court, is that right?

A. Yes, sir.

Q. And, do you recall what you were charged with in Division Nine in 1981?

The Court: This was Division Eight.

Q. I'm sorry. Division Eight. I'm sorry.

A. Burglary.

Q. Do you recall any other charges

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against you?

A. No, sir.

Q. And, were you indicted under a Persistent Felony Offender status?

A. I didn't know that.

Q. Did you have a lawyer?

A. Yes, sir.

Q. Who was your lawyer?

A. Thomas Clay.

Q. Did you hire Mr. Clay or was he appointed by the Court?

A. He was a hired lawyer.

Q. Do you recall when this was in 1981?

A. Sir?

Q. Do you recall when this was in 1981?

A. I believe it was in January.

Q. Can you recall when you entered your plea?

A. October, I believe.

Q. Were you in jail or out of jail up until the time when you entered your plea?

A. I was out of jail.

Q. Do you recall what this case

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was set for, the day you entered your plea? Was it set for anything besides your plea?

A. No.

Q. It wasn't set for trial or anything from what you know?

A. Not to my knowledge, it wasn't.

Q. Did you ever have any discussions with Mr. Clay regarding either a trial or the entry of a plea before you entered your plea in October?

A. No, sir.

Q. Mr. Raley, you said before that you didn't know about this PFO. Could you explain what you meant by that?

A. Well, when I came to court on the last court date, Mr. Clay and my father, and my brother-in-law and my girlfriend, we was out in the lobby in front of the Court Room and he come out and he said "They've got you indicted on Persistent Felony in the First Degree and Burglary." He said. "If you'll cop out to the PFO, Two, that they

would drop the PFO, One", which at that time, I didn't know that I had the PFO, One. So, I believe it was the prosecution, Mr Grimes, had came out in the lobby and told me, he says "I've got you before. Come on in. I'm going to get you again." Then, he stepped off. Then, Mr. Clay told him that he couldn't be — that,

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you know, that he was more or less harrassing his client. So, Mr. Grimes went back in the Court Room. So, then, Mr. Clay come back out. He entered the Court Room and came back out and had a paper, saying that if I would sign this, that I would — that he would — that the Judge would drop the charges down to Persistent Felony, Two, and it was just a five year sentence.

Q. Okay. Do you remember what type of sentence you actually received?

A. Five years.

Q. And, were you sentenced that day or was it passed?

A. It was passed. They give me, I think, it was close to thirty days to turn myself back in. It was on October 29th is when the final judgment was made.

Q. Okay. Now, do you remember on the day when you entered your plea if you signed any forms? Did Mr. Clay give you any forms to sign or did Mr. Grimes give you any forms to sign?

A. Only the form that he had brung out in the lobby for me to sign, stating that I would take the PFO, Two, the five years.

Q. Do you recall what that form said?

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A. No, sir.

Q. Do you recall if the Judge said anything to you?

A. After — He told me to remain out in the lobby and that when he needed me, he would come and get me and a few minutes passed and he came out and got me and we went in and the Judge called me before the bench, as well as Mr. Clay, and we stood in fromt of the bench and he held up the paper and asked me was this my signature and so on, and I said "Yes", and he wanted to know if I was forced or promised by anyone to make that decision, the same as the other Judge had said, and I said "No", and he said "So, in other words, you'e wanting to withdraw your plea of not guilty", and I says "Yes", and — but at that time, I didn't know that I was indicted on the PFO, One, until that day. I hadn't been informed of that until up to that day that I did — signed that paper saying that I would take the five years.

Q. Mr. Raley, in fact, you were indicted on the PFO, Two, do you know that now?

A. Sir?

Q. Do you know, in fact, that you were not indicted on PFO, One; you were indicted on PFO, Two?

A. I was?

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Q. Yes.

A. I didn't know that. They told me it was PFO, One. That's why I took the Two.

Q. Do you remember who told you that?

A. Mr. Clay.

Q. Do you know what the difference between PFO, One and PFO, Two was in 1979 and 1981?

A. I would say it's the same as now. The PFO, One, is ten, flat, and the PFO, Two, I think — you got up in a year, the same as you would an ordinary five sentence, unless it's enhanced.

Q. In dropping that PFO, One, did you think you were getting a good deal?

A. Yes, sir.

Q. Is that why you pled guilty?

A. Yes, sir.

Q. Do you remember if the Judge told you anything about what rights you had, specifically?

A. Just that I had the right to — let's see, what was it — that I had a right to a jury trial.

Q. Did he tell you anything else?

A. No, sir.

Q. Now, Mr. Raley, we've had

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discussions about this, haven't we, between ourselves? We've talked at least two times since you've been down at Lagrange, haven't we?

A. Yes, sir.

Q. Regarding this motion I filed on your behalf?

A. Yes, sir.

Q. And, you know what your rights are, don't you?

A. Yes, sir.

Q. The rights I've explained to you?

A. Yes, sir.

Q. Going back to 1979, did you know you had the right to a jury trial on any charge against you?

A. No, sir.

Q. Did you know you had the right to confront and cross examine witnesses?

A. No, sir.

Q. Did you know you had the right to remain silent and they would have to prove the case against you?

A. No, sir.

Q. Did you know that in 1981?

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A. No, sir.

Q. Mr. Raley, have you ever watched TV and seen trials on TV?

A. Occasions, but I never paid that much attention to them, no.

Q. What type of trials did you see on TV?

A. Maybe a little Perry Mason or something like that, but I don't pay that much attention to it.

Q. And how do those trial work? Can you tell us?

A. They always work out where Mr. Mason always wins. That's the best I've ever seen it. As far as any others —

Q. Did you ever see Mr. Mason pick a jury or anything like that?

A. No, sir.

Q. Did you ever see one of his clients not take the stand?

A. No, sir.

Q. You never saw one of his —

A. Not as I can recall. I don't ever pay that much attention to it. That's what I — I can't really say.

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Mr. Wettle: That's all the questions I have.

The Court: Cross examination, sir.

(Cross — Mr. Bybee)

Q. Mr. Raley, you finished the eleventh grade?

A. Yes, sir.

Q. You are able to read?

A. Sir?

Q. You are able to read?

A. Yes, sir.

Q. And, you're able to write?

A. Yes, sir.

Q. Would you say your reading is good, average, excellent?

A. Fair.

Q. Fair, Okay. When you got arrested in 1979, Mr. Marshall was appointed as your lawyer, correct?

A. Yes, sir.

Q. Was he your lawyer the full time?

A. I believe he was, yeah.

Q. So, you never had two lawyers

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on the case? Mr. Marshall was —

A. I think there was one that substituted on one court date before that, but other than that —

Q. We was there the whole time?

A. Sir?

Q. He was your lawyer the whole time?

A. Mr. Marshall was appointed my attorney, but there was one occasion where a substitute had came in, I believe, but it wasn't on the trial date. I think there was one instance where he had sent one of his associates from the public defender's office, or something.

Q. All right. Did you talk to Mr. Marshall?

A. Sir?

Q. Did you talk to Mr. Marshall? Did he come over and talk to you? Were you in jail the whole time?

A. He never come and talked to me except for in the Court Room.

Mr. Wettle: Judge, if I may interrupt at this time just a moment. If he's going to call Mr. Marshall, I don't think there's

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any reason to move for a separation, but if Mr. Bybee intends to call Mr. Marshall, since he's asking questions about Mr. Marshall, we would move for a separation of witnesses at this time.

Mr. Bybee: I may call Mr. Marshall, and the Commonwealth would like to exercise its right to have a witness present, sitting with counsel, and the Commonwealth would elect Mr. Marshall.

Mr. Wettle: But he'd have to shout from where he's sitting, Judge. If he wants to assist Mr. Bybee —

Mr. Bybee: Have him sit up there.

Mr. Wettle: And, I don't know what purpose another commonwealth attorney is going to be assisting Mr. Bybee. If Mr. Bybee needs help in the questions he needs to ask —

Mr. Bybee: Isn't that up to Mr. Bybee and not to defense counsel?

The Court: Mr. Marshall, of course, as all counsel, is an officer of the Court. We would ordinarily not exclude him.

Mr. Marshall: Your Honor, I'll go get a cup of coffee. That will solve that.

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The Court: Well, we'll not require him to be absent, but if he wants to go get a cup of coffee, he may do so.

Q. Mr. Raley, did —

The Court: The record may reflect that Mr. Marshall left the Court Room. Go ahead, sir.

Q. When you were arrested, you were arrested and spent all the time in jail prior to trial?

A. Yes, sir.

Q. How many times did you talk with Mr. Marshall?

A. Maybe three times, maybe.

Q. Well, where do you get that number?

A. Well, I went to Court at least three times, and that's the only time that I can recall ever talking to him.

Q. Well, that's not my question.

A. I don't recall talking to him at a visit, in a visiting booth or nothing like that.

Q. Are you saying that he didn't ever come and talk to you or you just can't remember if he ever came and talked to you?

A. I can't really recall if he did

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come and see me.

Q. Okay. So, it's possible that he could have come to see you, but you just don't remember?

A. Yes, sir.

Q. All right, so — but, you do remember that he did come and talk to you when you were in Court?

A. Yes, sir.

Q. At least those times you can remember?

A. Yes, sir.

Q. And of those times you can remember, you remember at least three times when he did come to Court and represented you, correct?

A. Correct.

Q. And at those times, you would talk to him, correct?

A. Yes, sir.

Q. And, he would inquire and you would tell him about your case, why you were there, correct?

A. Yes, sir.

Q. And you told him what it is that got you arrested, who else was there, what you were doing and the whole story, correct?

A. Yes, sir.

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Q. And you apprised Mr. Marshall of any available witnesses and any — your opinions about the facts of the case, correct?

A. Could you say that again, please?

Q. And you told Mr. Marshall your version of the facts and how you felt about the case, correct?

A. Yes, sir.

Q. Now, you came before Judge Hopson, correct?

A. Yes, sir.

Q. Or, excuse me, Judge Oldham?

The Court: '79 was Judge Oldham, wasn't it?

Q. '79.

A. '79 was Judge Oldham, yes, sir.

Q. And, Mr. Marshall made some agreement with the prosecutor in that case, correct?

A. I guess. I would say it was the prosecutor. As far as when I was sitting in the Court Room, I was sitting at the table and —

Q. Do you remember his name?

A. No, sir.

Q. You had been charged with Burglary, One — two counts of Burglary, One, and one count

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of Burglary, Three, correct?

A. Yes, sir.

Q. Okay. Burglary, One, is ten to twenty. Burglary, Three is one to five, correct?

A. Yes, sir.

Q. If you were max'd on everything you could have got, a possibility, a total of forty-five years, correct?

A. Yes, sir.

Q. But somehow you got it in your mind you were going to get fifteen years, because the Judge told you you were?

A. He says that I could get up to thirty-five or forty years.

Q. Okay. Where did the fifteen come in?

A. Said that — Mr. Marshall had sat down at the table with me and told me that if I would cop — that he would probably give me five years on each.

Q. Okay. So, he comes to you and says "The prosecutor is going to recommend five years on each of these charges", correct?

A. Yes, sir.

Q. But the Judge could run them

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wild or could run them consecutive of concurrent, correct?

A. Yes, sir.

Q. And so, you knew that?

A. Yes, sir.

Q. And, you thought that was a pretty good deal in view of the range of the penalty, correct?

A. Yes, sir.

Q. And, you also knew that you didn't have to take that deal, didn't you?

A. I didn't really know, no.

Q. You thought you had to?

A. Yes.

Q. Did he force you to?

A. No.

Q. Did he make you sign?

A. No, sir.

Q. Did he make you plead guilty?

A. No, sir.

Q. Did anyone make you plead guilty?

A. No, sir.

Q. Is this your signature, Mr. Raley?

A. Yes, sir.

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Q. Do you recall signing this document? Would you like a few minutes to look it over?

A. (Witness looks over document.) That's my signature.

Q. Did you, in fact, sign this document?

A. Yes, sir.

Q. Do you have any trouble reading this, Mr. Raley?

A. No, sir.

Q. Do you understand — When you read a sentence here, do you understand the sentence?

A. Yes, sir.

Q. Do you recall reading this document before you signed it?

A. No. sir, I just signed it.

Q. Without reading it?

A. I seen where it had "Enter of guilty plea of One, Two and Three" something like that. It was written out. Seems like I remember reading that, but as far as the whole page or nothing like that, no, I didn't read that.

Q. Someone just shoved the document in front of you and said "Sign here", and you signed there?

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A. Well, he just told me that I would probably get it dropped down; it would be, probably, fifteen years, and

chances was I could get it dropped down to five years, and so, I signed the paper.

Q. And you felt that was a whole lot better than getting the forty-five, correct?

A. Yes, sir.

Q. Well, how would you have gotten the forty-five?

A. Like I said, he just gave it to me. I don't know.

Q. Well, did Mr. Marshall say "We're either going to — you can either sign this and say you're going to get five, or don't sign it and we'll give you forty-five? It that how it was?

A. He just said that if I would just sign that paper that my chances of getting five years would be good. That was all he told me.

Q. You recall that specifically?

A. To the best of my knowledge, yes.

Q. Do you remember standing in front of the Judge and the Judge asking you some questions?

A. He asked me was that my signature and I had told him "Yes". He asked me was I forced by

anyone to sign that document or has anyone promised me anything, and I says "No". He wanted to know if I was under any intoxicants or medication or anything, and I said "No".

Q. And, that was the whole conversation?

A. Yes, sir.

Q. Okay. You have recited to us the complete conversation between yourself and Judge Oldham?

A. Yes, sir.

Q. And, you haven't left out any details?

A. Just other than he read out my charges and tell me what I could — the chances of the time I could be getting,

but after I — after I signed the — after I signed the paper, then that's when he said "I sentence you to fifteen years in the Kentucky State Reformatory, but be running concurrent, a total of five years".

Q. Do you know for a fact, Mr. Raley, that Judge Oldham did not say to you, "You have a right to a trial"?

A. I can't really say for a fact, no.

Q. Okay. So, it's possible he could have said that?

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A. I would say chances are "Yes".

Q. You just don't recall it?

A. No, I'm not saying that. I don't remember him saying anything like that.

Q. He could have, though.

A. Possible.

Q. And, it's also possible that Judge Oldham could have said "You have the right to cross examine witnesses"?

A. It's possible.

Q. And, it's also possible that he could have said "You have the right to call witnesses on your own behalf"?

A. Yes, sir.

Q. It's also possible that he could have said "And, you don't have to testify against yourself"?

A. That's possible.

Q. So, what you have told us about the conversation between you and Judge Oldham is just what you remember Judge Oldham saying, correct?

A. Yes, sir.

Q. And, you're not representing to this Court that that was the entire conversation and nothing else was said?

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A. Sir?

Q. You're not representing to the Court that what you've told us is the entire conversation between you and Judge Oldham and nothing else was said?

A. I'm just saying everything that I recall.

Q. Now, you are telling us. Mr. Raley, that you were sent that same day?

A. Sir?

Q. You were sent that same day that you pled?

A. No, I remained in jail and then, and I went to — I was sent to the reformatory, is that what you're talking about?

Q. No, what I'm asking you is, the day that you pled guilty, were you also sentenced that same day?

A. I believe I was sentenced — No, I don't believe I was sentenced that day.

Q. Okay. You waited in jail for some time?

A. I remember — I think the final sentencing day was like January 2nd or 3rd of '80.

Q. You came back into Court, then?

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A. Yes, sir.

Q. All right, for sentencing, and you were sent to the reformatory?

A. Yes, sir.

Q. How long did you spend in the reformatory, total penitentiary time, wherever were?

A. Thirteen months.

Q. And, there were —

A. Nine months, I had four in jail. Around nine months.

Q. Nine months, and you circulated with other prisoners there, correct?

A. Yes, sir.

Q. Some of which were — had been convicted by jury trials, correct?

A. Yes, sir.

Q. You came back and were convicted in 1981? Correct?

A. Yes, sir.

Q. And, your attorney was Thom Clay?

A. Yes, sir.

Q. And, you are stating to the Court that Thom Clay told you that you were charged as

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a Persistent Felony Offender in the First Degree?

A. Yes, sir.

Q. And, did he also tell you what that meant?

A. I already knew what it meant; ten flat years.

Q. You learn a lot about the criminal justice system and the way the courts work when you're in prison, don't you?

A. I'd say you could, yeah, if you want to take the time, yeah.

Q. You're circulating among prisoners who have all gone through the court system, correct?

A. Yes, sir. Yes, sir.

Q. And, they all have their story to tell, don't they?

A. Yes.

Q. And, you come back and Mr. Clay tells you "I can get this PFO, One, reduced to a PFO, Two", is that what he tells you?

A. Yes, sir.

Q. "But, if you don't want that, we can go to trial", correct?

A. Yes, sir.

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Q. And, you didn't want a trial?

A. No, sir, not a PFO, One.

Q. You didn't feel that your chances were good before a jury, correct?

A. No, sir.

Q. And, you didn't particularly care to call any witnesses or put on a defense, correct?

A. I never was informed of all that, no.

Q. Well, you just told us you didn't want a jury trial.

A. Well, that part, yes, but as far as the witnesses, I never had any myself. So —

Q. You didn't have any witnesses?

A. No, sir.

Q. Did Mr. Clay know that?

A. I'm sure he did, yes.

Q. Did you talk to him about it?

A. Yes, sir.

Q. Did you tell him about the case?

A. Yes, sir.

Q. He knew all the facts as you knew them?

A. Pretty much so, yeah

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Q. And you didn't give him any names of any witnesses that he could call?

A. No.

Q. Is this your signature, Mr. Raley?

A. Yes, sir.

Q. Do you recall signing this document?

A. Yes, sir. That was the one I — I think that was the one I signed out in the hallway, out in the lobby.

Q. And, the charges, as they are listed on this sheet are what, can you read those?

A. Burglary, Three; Persistent Felony Offender, Two; Complicity.

Q. And, RSP?

A. Yes, sir.

Q. It does say "PFO, Two" under "Charge", correct?

A. Yes, sir.

Q. Now, both of these pleas–were regular pleas as opposed to Alford Pleas. Do you know what an Alford Plea is, Mr. Raley?

A. No, sir.

Q. Okay. During both of these

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pleas, you had to admit to the Court that you actually committed the crime, correct?

A. Right.

Q. And, you did that, did you not?

A. Yes, sir.

Q. In fact, Mr. Clay got one of these charges completely dismissed for you, didn't he?

A. I don't recall that.

Q. Okay. Let me show you this again. Let me see if this refreshes your memory, where it says "Dismiss Complicity and RSP"?

A. I didn't remember that. I never seen that there. The only thing I remember seeing is what I signed and I —

Q. In fact, you pled guilty to Burglary, Three, five years — enhanced to five years on a PFO, Two, correct?

A. They told me that it would be just like an ordinary five year sentence —

Q. All right.

A. — if that's what that means, yes.

Q. And, you felt that that was a good deal, correct?

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A. Yes, sir.

Q. And, you went along with it?

A. Yes, sir.

Q. And, nobody forced you to?

A. No, sir.

Q. And again, in going before Judge Hopson, did he ask you — Well, you've already told us that he told you about not being forced and not being intoxicated, correct?

A. Yes, sir.

Q. And — But, you're not representing to the Court that that is the entire conversation between you and Judge Hopson, are you?

A. I believe that — I can't recall that, but I'm sure that if I was aware of all them facts as well as I know now, I would, like, on my first felony, I probably would have took a jury trial by it being my first felony offense and I would have probably got some play on that, but I wasn't sure. I wasn't taking no chances, but on him, no, I can't recall.

Q. I'm going to repeat my question, Mr. Raley, and I want you to listen carefully. You're not representing to the Court that when you pled before Judge Hopson that the facts as you recited them to us represents the entire conversation between you and Judge Hopson, are

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you?

A. He could have said more.

Q. He could have said more?

A. Could have, yes.

Q. He could have said "Mr. Raley, you have a right to a jury trial", right?

A. Correct.

Q. He could have said "Mr. Raley, you have a right to cross examine witnesses and call witnesses on your own behalf" couldn't he?

A. I don't believe that. I mean, I don't remember hearing that, no, sir.

Q. But he could have said it?

A. Yes, yes, he could have.

Q. And, he also could have said "Mr. Raley, you have the right to remain silent", correct?

A. Yes, sir.

Q. So, what you have told us is just what you recall and not necessarily just exactly what happened?

A. Yes, sir.

Mr. Bybee: That's all the questions I have.

The Court: Thank you, Mr. Raley. Anything else, Counsellor?

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Mr. Wettle: No, Your Honor.

The Court: All right, sir, you may step down. Anything further from the Defendant?

Mr. Wettle: Mr. Raley is our only witness, Your Honor.

The Court: Any witnesses for the prosecution?

Mr. Bybee: I'd like to call Thom Marshall, Your Honor.

The Court: See if Mr. Marshall is outside.

The witness, THOM MARSHALL, after having been first duly sworn, was examined and testified as follows:

(Direct - Mr. Bybee)

Q. Mr. Marshall, you are an Assistant Commonwealth Attorney, now?

A. Yes, I am.

Q. And, at one time, were you also a Public Defender?

A. I was.

Q. Did you represent Ricky Raley?

A. I do not recall. Looking at this gentleman here I assume is Mr. Raley, I don't have any specific recollection of representing Mr. Raley.

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Q. Do you recognize your signature?

A. Yes.

Q. Is that, in fact, your signature?

A. Yes, it is.

Q. Would you please tell us what that document is?

A. This was a form plea of guilty that was used back in, I guess, 1979. Let's see when I signed it. In 1979. I had looked at it briefly prior to taking the stand. I recognize not only my signature but my writing on the — well, it says "Page 115", but I mean the first page, it says "Plea of Guilty" with the style of the case.

Q. Would you tell us what the function of that document is?

A. It was a form which the defense lawyer would go over with his client prior to his coming before the Court on a plea of guilty. It was to advise the Defendant of all of his constitutional rights and to make a written record of the fact that that had been done.

Q. The part that contains your signature, that specific page, would you tell us what that says, please?

A. Yes, this is a Certificate of —

Mr. Wettle: Judge, I'm going

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to object at this point as to the introduction of this specific document against Mr. Raley. I believe Mr.

Marshall has already said that he has no specific recollection of Mr. Raley. Unless Mr. Marshall relates specifically what occurred between him and Mr. Raley and what he related to Mr. Raley in regards to this specific document. I don't believe he can testify in general as to what this document looks like or consists of. There's been no foundation laid for this. We're dealing specifically with what occurred on, I believe, October 29th, in 1979 in Division Two of Jefferson Circuit Court; not with Mr. Marshall's general practice of law as a public defender or with the general practices of the court system in 1979.

The Court: I expect he may testify regarding his own Certificate or whatever that is, there.

Q. Would you read that to us, Mr. Marshall?

A. Yes, it's a Certificate that I signed on the 29th day of November, 1979 in which I certified that I was the attorney of record for Ricky Harold Raley, that I had read and fully explained to Mr. Raley the allegations contained in the Indictment; that I

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had fully explained his constitutional rights to him; that to the best of my knowledge and belief, the statements and representations and declarations made by Mr. Raley in the foregoing Petition on the Plea of Guilty, are accurate and true; that the Plea of Guilty that Mr. Raley entered was with my understanding of the facts as related to me by the Defendant, was consistent with my advice to him, and that it was my opinion that the Plea of Guilty as offered by Mr. Raley was voluntarily and understandingly made, and I recommended to the Court that his Plea of Guilty be accepted on behalf of Mr. Raley, and I signed this document in open

Court November 29th, 1979 in Division Two. Judge Oldham, I believe, was then the Judge.

Mr Bybee: Thank you. That's all.

The Court: Cross examination, sir?

Mr. Wettle: I just have a few questions of Mr. Marshall.

(Cross - Mr. Wettle)

Q. Mr. Marshall, how long were you a public Defender?

A. Six and a half years.

Q. And, approximately how many clients did you represent? Just give us a rough figure?

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A. I really wouldn't know. We had — Our caseloads varied considerably, and there was a significant change in the Court's structure during that six and a half years. I would estimate hundreds, if not thousands, of clients.

Q. And how many Guilty Pleas would you have entered in Circuit Court?

A. Many. Well over — in the hundreds, I'm sure.

Q. And, you don't have any specific recollection of Mr. Raley, here, do you?

A. To look at them, you know, some clients who I see, I recognize their face. I don't recognize Mr. Raley's face that much. I've got to be real honest with you. I don't. There was — Some of the cases that I had, there was something unusual about that would stick in my memory. I did not have an opportunity to look at my file which would still be in the Public Defender's Office. If I were able to look at that, I'm sure I could refresh my recollection as to the specifics of this particular case.

Q. And, it's not uncommon for you to see someone you perhaps represented eight years ago, and not remember anything about them?

A. That's entirely possible, yes.

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Q. And, this Certificate that's attached to this form that you say you put your signature on, that's the usual Certificate that's attached to the end of these Guilty Plea forms, isn't it?

A. The form that was being used at that time, that's correct. I would point out I also filled out the first part.

Q. Okay.

A. Other than where Mr. Raley signed.

Q. And, it was your normal course of business to fill out that certificate.

A. We filled that out. We would fill it out in open court, normally, prior to the entry of the plea.

Q. Sometime you would fill it out in the hallway?

A. Normally, you'd just sit down, and — I would normally sit down in the Court Room and do it.

Q. Do you recall specifically on the 29th of November filling out this Certificate, in 1979?

A. No, but that is my signature.

Q. You say in this Certificate that the plea — that he was pleading guilty pursuant to your advice?

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A. That's correct.

Q. Can you tell us what your advice was in regards to that plea of guilty, what evidence they had against him, why you were advising him to plead guilty?

A. I cannot recall all the details of the case. In looking at the Plea Sheet, I note that Mr. Raley was charged with two counts of Burglary, First Degree, which at that time was a Class B felony; that our Plea Agreement was to amend those two B felonies to D felonies and to recommend a total of five years on each of three counts of Burg-

lary, Third, for a five year concurrent sentence. I moved for probation, but in Division Two, nobody walks away.

Q. And, as a defense attorney, you've tried many Class B felonies, didn't you?

A. Yes.

Q. And won acquittals, in fact, on quite a few of those, at least?

A. I had a modest success rate.

Q. And, as a prosecutor, you've tried Class B and A felonies, haven't you?

A. Yes.

Q. And, lost some of those?

A. It's hard to believe, but it's

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true.

Q. And just because a person would be charged with a Class B or A felony, which carries, perhaps ten to twenty or twenty years to life, the severity of that would not be the sole basis of your advising a person to plead guilty, would it?

A. No, I'd never — On one occasion, I urged one Defendant to plead guilty. Without exception, the rest of the time I left it up to them. It was their decision. It's my feeling. It's their decision.

Q. What about — One of the most important bases is usually without the disparity of the punishment likely, but would it be, you would agree, the strength of the Commonwealth's case?

A. Certainly.

Q. If they had a very weak case even though it was a very severe punishment, you wouldn't urge a person to plead guilty, would you.

A. As I said, I only recall one person in my six and a half years, urging them to plead guilty. The rest of the time, I explained it to them and told them it was their decision.

Q. And, at this time, you do not recall the strength of the Commonwealth's case against Mr. Raley, do you?

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A. Not without looking at more of the — looking at the file.

Q. Do you recall any of the proceedings on the 29th of November, 1979 before Judge Oldham, specifically with Mr. Raley?

A. Again, without looking at a transcript or my file, I can't tell you, honestly, that I recall that.

Q. In looking at this Plea Sheet, there's a recommendation of five years and no stand on probation, is that correct? Is that the position the Commonwealth took?

A. Whatever is on there. It was five years concurrent to serve. I think it was to serve, isn't it?

Q. I believe you said you made a motion for probation, though?

A. As I recall, it indicates in there that my motion for probation was denied or it's possible — Again, you'd have to look at the file, which would speak for itself — it's possible that David O'Brien from our office stood in at sentencing. I'm not — that was sometime after the 29th of November.

Q. And other than the facts contained on this document, you really don't remember any of the

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facts in the case, do you? You don't remember Mr. Raley or any facts of the case of the guilty plea, do you?

A. As I recall, Mr. Raley was charged in all three instances with breaking into garages, and I think the state of the law back at that time was that an attached garage was part of the dwelling and that was the reason for the two Burglary, One's. That's —

Q. Other than that, do you remember anything?

A. No.

Q. How many of these sheets do you think you've filled out over the years as a Public Defender?

A. I couldn't give you an honest guess, sir. I don't know. Many.

Q. Do you recall—do you recall anything specifically about this sheet besides recognizing your signature and your handwriting?

A. Just, you know, that that form is something that I went over. Before I would sign anything like that, I would have very carefully gone over and done what it says that I did.

Q. Do you recall, specifically, where you sat down with Mr. Raley and what he said in reply to you, anything such as that?

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A. I recall nothing unusual out of, you know, of that situation.

Q. Do you recall anything usual about that?

A. I don't recall anything unusual about it at all.

Q. Anything usual?

A. Well, what I'm talking about was, if there had been something unusual to come up, fact situation; for instance, many times I end up going to trial as a Public Defender when I would have preferred that my client would have pled, but then when they decided not to plead, then we went

to trial. In this case, obviously, Mr. Raley pled and there was nothing unusual about that.

Q. And, nothing about it specifically stands out in your mind, at this time?

A. No, there's not, not without being able to look at my notes and the case file.

Mr. Wettle: Thank you. That's all the question I have.

The Court: Anything else from the prosecution?

Mr. Bybee: No, sir.

The Court: All right. I guess I'll ask you one question, Mr. Marshall.

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Question By The Court:

Q. That's only that your testimony is that you did certify on that date that is your signature, that you did certify on that date that you explained these rights to the Defendant?

A. That is correct, Your Honor.

Q. And, that he understood them and—

A. Yes, sir.

The Court: All right. Anything else?

Mr. Wettle: Judge, I have just two brief comments to make.

The Court: Well, I don't know if the prosecution has another witness?

Mr. Bybee: No, sir.

The Court: All right, I'd like to hear comments.

Mr. Wettle: Judge, just briefly, we cite the controlling case law in our motion, and the situation we have here was cited to observe, specifically in Boykin, when they refer to the fact that we have a silent record;

that there's no written record on an exchange between the Court and the Defendant, in which the

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Court determines that the plea is knowing and voluntary, then the Courts of Appeal and the Courts of Review, at this point is acting now as Court of Review, are reduced to memory of what actually occurred. We have two memories here. We have the memory of Mr. Raley. We have the memory of Mr. Marshall who exhibited normal memories of what occurred approximately nine years ago and seven years ago. Mr. Raley does not recall being read his rights at either of those occasions. He candidly acknowledges the fact that perhaps the Judge did read him his rights. He doesn't recall it. There's no records to indicate in either of the files that the Judge personally specifically, read him he rights, as is the normal practice in this Court in the Jefferson Circuit Court at this time, and it seems to be confirmed by *Gordon* v. *Alabama*. There is an indication in the file that a Guilty Plea Sheet was filled out by Mr. Marshall. Mr. Raley doesn't remember signing that. He remembers the offer that was made. He doesn't remember reading over the sheet. Mr. Marshall remembers that it was the standard practice to sign these sheets back then and it still was the same practice. However, his

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memory, he cannot recall anything specifically about this case. He cannot recall Mr. Raley, specifically. He can't really recall any details about this case, whatsoever; certainly not to fault Mr. Marshall or Mr. Raley. That's what would be expected, and that's why the Supreme Court of the United States and the Supreme Court of Kentucky and the appellate courts of Kentucky have held that there must be written records. Otherwise, we're reduced to processes

such as this. In response to some of "Mr. Bybee's questions in regard to "that you got a good deal" or "that you didn't get a good deal", I don't really believe that's relevant to the determination of whether a conviction entered is constitutionally valid; whether that condition is knowingly or voluntarily made. We are challenging these convictions, not on the basis of whether he got good deals or bad deals. We're challenging them on whether the Court fulfilled its constitutional duty in protecting Mr. Raley — protecting his constitutional rights by determining from him at the time whether his plea was knowing and voluntary; whether he got one day in jail or he could have gotten one hundred years in jail is of no consequence if a person's constitutional rights are at stake. Whether

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he got a good deal or a bad deal, I believe, is of no relevance to this proceedings. What is of relevance is, did he know what he was doing? Did he know what he was giving up? We believe on the basis of the evidence entered today, that is a very open question. At this point, from the testimony of Mr. Raley and the testimony of Mr. Marshall, perhaps, he was and perhaps he wasn't. Since this is an open question, we believe that under *Johnson* v. *Erst*, in which the United States Supreme Court said that every Court has a duty to make sure that all pleas are knowingly and voluntarily entered, that this Court should make a determination that these pleas were not knowingly and voluntarily entered, therefore, should grant our motion to suppress Count 2 of this Indictment.

The Court: Mr. Bybee?

Mr. Bybee: Judge, as far as the 1979 conviction goes, we feel that, first of all, the Defendant should not even be able to raise that issue since they pled guilty to being a Per-

sistent Felony Offender in the Second Degree in 1981, at which time, at which time you must admit that you have been convicted of a prior felony, so that any attack would have been waived in 1981 to

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that 1979 conviction and they shouldn't even be heard on that issue. Second of all, looking at the record itself, you have a document signed by the Defendant on which it advises him of his rights and he tells us that he reads, he has an eleventh grade education. There's no problem there. He was represented by counsel and we have a certificate of his counsel, an officer of the Court, stating — which he signed on that date — that he has, in fact, advised him of his rights. He was sent to the penitentiary, and I submit to the Court that one can gain quite an education from the penitentiary about the Court system. He comes back the second time and he tells us again that he doesnt' know he has a right to a trial, despite being advised of that fact the first time he came to Court. Mr. Raley loses much credibility, Judge, we would — He has not stated that that was the entire conversation. He has told us quite frankly that his memory is faulty; that he's not sure, that he doesn't remember — it could have happened. So, he has not even come forward with evidence stating with assurity that those rights weren't given to him. On that basis, we have, number one, a Defendant who has failed to even initially meet his burden of proving

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that the convictions were irregular, and second, you have a contemporaneous document which shows that Mr. Raley was, in fact, advised of his constitutional rights, and for those reasons, Judge, we would ask that the Court overrule

the Defendant's motion and admit both convictions for all purposes connected with the trial.

Mr. Wettle: Judge, just a brief response to the first assertion that we should be barred. I believe he's citing *Alvie* v. *Commonwealth* in regards to the 1979 case.

The Court: He isn't citing it, but he said — he said, in effect, what Alvie said.

Mr. Wettle: Okay. Well, Alvie deals with the situation where someone was convicted of a Persistent Felony Offender and then attempted to come back and file an action under 1142 to overturn the Persistent Felony Offender conviction, and what Alvie said was issued at the same time as Gadd, what Alvie said is the procedure that we follow is that prior to trial, one must file a challenge to the Persistent Felony Offender portion of the Indictment. In one files — failed to file, in Gadd, then therefore, if they're convicted of PFO or pleads to PFO after that trial, you waive your challenge.

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You can't come back on 1142 and say "I now come back and challenge what I was convicted of". So, that's what we did here. We filed the pre-trial motion. We're challenging it prior to trial and prior to entering the plea. So, Alvie doesn't apply. We're not coming back under 1142.

The Court: Counsel is saying you're trying to get a second bite of the apple, and that you had your bite at the apple in 1982, I believe.

Mr. Wettle: "Well, Alvie gives the situation —

The Court: I understand.

Mr. Wettle: You know, that's —

The Court: I understand what your contention is, sir.

Mr. Wettle: That's all I have to say.

The Court: All right, sir. On the basis of the record, the evidence and the totality of the circumstances shown at this hearing, the Court finds that the Defendant intelligently pled guilty in both of these prior instances, with full knowledge of the nature and consequences of a plea of guilty, and that the record is now complete

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to that extent, and that therefore, the motions to dismiss those or to vacate those final sentences or not to utilize them in the present proceedings are overruled. Now, with thta in mind, and the present case before us, what is the pleasure of the Commonwealth?

Mr. Bybee: Do we have a negotiated plea?

Mr. Wettle: Yes.

(Thereupon The Proceedings Were Concluded.)

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REV 6/82

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Western District of Kentucky	
Name: Ricky Harold Raley	Prisoner No.: 82623	Docket No.:

Place of Confinement:
Kentucky State Reformatory- P.O. Box 188, LaGrange, Kentucky 40032

Name of Petitioner (include name upon which convicted): Ricky Harold Raley

V.

Name of Respondent (authorized person having custody of petitioner): Al C. Parke, Warden

The Attorney General of the State of: Hon. Fred Cowan- Commonwealth of Kentucky

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Jefferson Circuit Court, Division 15, Hall of Justice, Louisville, Kentucky 40202

2. Date of judgment of conviction: June 4,1987

3. Length of sentence: Ten (10) years

4. Nature of offense involved (all counts): Second degree robbery, and first degree persistent felony offender.

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☒
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)
   (a) Jury ☐
   (b) Judge only ☒

7. Did you testify at the trial?
   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court Kentucky Court of Appeals

(b) Result Affirmed

(c) Date of result April 22,1988 (unpublished opinion)

(d) Grounds raised THE TRIAL COURT ERRED WHEN IT RULED THE CONVICTIONS ADMISSIBLE. UNDER THE CORRECT FEDERAL TEST, THE COMMONWEALTH DID NOT MEET ITS BURDEN OF SHOWING VALIDITY BY CLEAR AND CONVINCING EVIDENCE.

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10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court Kentucky Supreme Court

(2) Nature of proceeding Motion for discretionary review of the Kentucky Court of Appeals decision affirming conviction.

(3) Grounds raised Whether the trial court and the Court of Appeals applied the correct standard to the facts developed in determining the validity of prior convictions used for persistent felony offender enhancement purposes.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Motion denied

(6) Date of result June 21,1988

(b) As to any second petition, application or motion give the following information:

(1) Name of court None

(2) Nature of proceeding

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court None

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: PETITIONER WAS DENIED FEDERAL DUE PROCESS OF LAW BY PROCEDURE OF THE TRIAL COURT IN ALLOCATION OF THE BURDENS OF PROOF AND PRODUCTION USED IN PERSISTENT FELONY PROCEEDINGS FOR PUNISHMENT ENHANCEMENT.

Supporting FACTS (tell your story *briefly* without citing cases or law):

See Memorandum (attached hereto).

B. Ground two:

Supporting FACTS (tell your story *briefly*, without citing cases or law):

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

Were presented

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Hon. Mark Weattle , Public Defender - Jefferson District, 200 Civic Plaza, 719 W. Jefferson St., Louisville, Ky. 40202

(b) At arraignment and plea Same as above

(c) At trial Same as above

(d) At sentencing Same as above

(e) On appeal Hon. J. David Niehaus, Deputy Appellate Defender of the Jefferson District Public Defender, 200 Civic Plaza, 719 West Jefferson Street, Louisville, Kentucky 40202

(f) In any post-conviction proceeding

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☒ No ☐ sentenced to term of 5 years on Rob.II, enhanced to term of 10 years via PFO I.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☒ No ☐
(a) If so, give name and location of court which imposed sentence to be served in the future: Jefferson Circuit Court, Louisville, Kentucky

(b) Give date and length of the above sentence: October 8, 1981 - 5 year sentence. Note; must serve remainder of this sentence pursuant to parole violation.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

7/10/89
(date)

Ricky H. Raley
Signature of Petitioner

No. 91-719

FILED
APR 16 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN - - - - Petitioner

versus

RICKY HAROLD RALEY - - - Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires that the prosecution prove the validity of a prior conviction offered for sentence enhancement by "clear and convincing evidence", when the state court's record of the prior conviction shows that the defendant was represented by counsel but is silent as to whether a *Boykin* v. *Alabama*, 395 U.S. 238 (1969), colloquy was given?

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No. 91-719

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN - - - - - - *Petitioner*

v.

RICKY HAROLD RALEY - - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

The Attorney General of the Commonwealth of Kentucky as counsel for Al C. Parke, Warden of the Kentucky State Reformatory, requests that the Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit and states as follows:

OPINIONS BELOW[1]

The opinion of the United States Court of Appeals for the Sixth (AP 3-21) is reported as *Raley* v. *Parke*, 945 F.2d 137 (6th Cir. 1991). The opinion of the United States District Court for the Western District of Kentucky is not reported. (AP 21-25) (March 15, 1990). The opinion of the Kentucky Court of Appeals affirming the conviction is

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[1]Appendix to Petition for Certiorari is cited as "AP".

not reported (AP 26-33) (April 22, 1990). By order entered June 21, 1988, the Kentucky Supreme Court denied respondent's motion to review the opinion of the Kentucky Court of Appeals. (AP 7).

JURISDICTION

The judgment to be reviewed is that of the United States Court of Appeals for the Sixth Circuit decided and filed September 19, 1991. *Raley* v. *Parke,* 945 F.2d 137 (No. 90-5446) (AP 1-3), affirming in part and reversing in part the judgment of the United States District Court for the Western District of Kentucky (Civil Action No. C-89-0756 (L)(A)) (AP 21-25). The jurisdiction of the United States District Court was invoked pursuant to title 28 U.S.C. §2254. (See AP 21). The Court has jurisdiction to review the judgment and opinion of the Sixth Circuit Court of Appeals pursuant to Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These provisions are in the appendix to this brief.

STATEMENT OF THE CASE[2]

Respondent was indicted on May 13, 1986, for the felony offenses of second degree robbery and for being a persistent felony offender in the first degree, which are the offenses for which he is presently incarcerated. (AP 27). [The Sixth Circuit opinion erroneously refers to burglary rather than robbery. (AP 4).] On November 11, 1986, respondent filed a motion to dismiss count two of the indictment, which was the persistent felony offender charge. (R. 3; TR 36). [A persistent felony offender conviction operates to enhance the offense for the underlying crime by auto-

matically increasing the minimum and maximum permissible punishment. Ky.Rev.Stat. 532.080. See appendix 4-6 to this brief.] The state court hearing was held on May 28, 1987, and the Kentucky trial court ruled that both convictions sought to be used by the prosecution as evidence were constitutionally valid. (AP 32-33; AP 5-8; TE 60-61.)

The first prior conviction relied upon by the Commonwealth to prove the persistent felony offender status in this case was entered on January 3, 1980, (No. 79-CR-1214) in which Respondent received a sentence of five years on each count of a three-count indictment for burglary offenses. The second prior conviction relied upon by the Commonwealth for the persistent felony offender status was entered on October 8, 1981, (No. 81-CR-0269) in which respondent recieved a sentence of five years upon a plea of guilty to third degree burglary and second degree persistent felony offender. (AP 22-25.)

In State court, respondent argued that each of these two prior convictions were invalid because the State court record did not contain the transcript of guilty plea proceedings nor did it contain a record of colloquy between the court and respondent during the plea proceedings. Respondent contended the pleas were invalid because there was no showing that he knowingly waived the rights guaranteed him under the United States and Kentucky constitutions. The prosecutor filed certified copies of the judg-

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[2]Joint Appendix containing guilty plea documents is cited as "JA". Transcript of evidence at the persistent felony offender pretrial hearing, May 28, 1987, to exclude the prior convictions is cited as "TE" (JA 37 et seq). The state trial court record other than the transcript of evidence is cited as "TR". The state court transcript of evidence and record were filed in the U. S. District Court as part of item 3. The record of the U. S. District Court on the habeas petition will be cited as "HR".

ments entered on the guilty pleas on the prior convictions. The State trial court advised the respondent that this shifted the burden of going forward on his claim of invalidity to him. Respondent argued that under the precedent of the Kentucky Supreme Court, the trial court had correctly stated the law, but he believed that because the records of the two prior convictions contained a "silent record" the earlier plea should be presumed constitutionally invalid. Respondent then took the stand and testified concerning his recollection of the guilty pleas. Respondent testified to the effect that he did not remember whether the trial judge advised him of his constitutional rights in connection with the guilty pleas and was not familiar with trial procedures. (AP 27-33; TE 3-42.)

The Commonwealth called as its witness, Tom Marshall, who had represented respondent in connection with the 1980 guilty plea. Mr. Marshall could not recall his representation of respondent during his testimony at the State court evidentiary hearing, but he did authenticate his signature on a document identified as "form plea of guilty that was used back in . . . 1979." Mr. Marshall confirmed that the certificate on that form showed that he was the attorney of record for respondent, that he had read and fully explained to respondent the allegations contained in the indictment, that he had fully explained his constitutional rights to him, and to the best of his knowledge and belief the statements and representations made by respondent in a written petition on a plea of guilty were accurate and true, and that the plea of guilty was consistent with counsel's understanding of the facts as relayed to him by respondent and was consistent with Marshall's advice to respondent. (TE 43-52) [The form testified to by Mr. Marshall and the State court was added to the habeas

record pursuant to order by the federal district court. Another type of guilty plea form indicating the Commonwealth's recommendation for a plea of guilty, and signed by Mr. Raley and his then attorney, was produced concerning the 1981 guilty plea pursuant to order (HR 5-6) by the Federal District Court. (AP 7-8; JA 2-25)] The State trial court denied respondent's motion to suppress the prior convictions. Respondent then entered a conditional guilty plea pursuant to Kentucky Criminal Rule 8.09 by which to appeal the order denying the motion to suppress the prior convictions used to establish the persistent felony offenders status. (AP 27-33; AP 5-7.)

On April 22, 1988, the Kentucky Court of Appeals affirmed respondent's conviction in an unpublished opinion. It concluded that the 1981 guilty plea conviction was valid and that there was sufficient evidence before the trial court to ascertain in its validity (AP 26-33) and stated in part (AP 32):

> However, while appellant contends that he was ignorant of the charges against him, he acknowledges he signed a form which specifies the charges in which he agreed to plead guilty. Furthermore, the fact that appellant was fully advised of his rights in 1979 permits an inference that he was still aware of his rights two years later in 1981. In addition appellant's testimony indicates that his knowledge and sophistication regarding his rights under our judicial system increased substantially after his first conviction.

On June 13, 1989, the respondent filed a petition for writ of habeas corpus in the United States District Court attacking his persistent felony offender sentence and in particular the 1981 guilty plea conviction upon which it

was based. The District Court denied the writ essentially agreeing with the Kentucky Court of Appeals. (AP 21-26.)

On September 19, 1991, the Sixth Circuit issued an opinion upholding the 1980 guilty plea but concluding that the Commonwealth had failed to prove the validity of the 1981 guilty plea. The Sixth Circuit panel found that it was bound by the previous Sixth Circuit opinion in *Dunn* v. *Simmons*, 877 F.2d 1275 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1539 (1990). (AP 13.) The Sixth Circuit stated in part (AP 10 and AP 20):

> [Respondent] correctly notes that in *Dunn* we established that a State may not carry its burden under *Boykin* by utilizing a presumption, and that any extrinsic evidence it offers must be clear and convincing. He once again correctly notes that we specifically disapproved in *Dunn* of the burden-shifting procedure that the trial court used in this case. . . . [T]he District Court is directed to grant Raley's writ of habeas corpus if Kentucky does not within ninety days hold a new hearing under . . . *Dunn* v. *Simmons* on Raley's contention regarding his 1981 conviction. [Citations omitted.]

SUMMARY OF ARGUMENT

I. The rule established by this Court in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), requiring a plea colloquy, applies to a direct appeal from a conviction, but not a collateral attack. A collateral attack is not a substitute for an appeal. A rule to the contrary, as applied by the Sixth Circuit in this case, rewards a criminal defendant for deferring a constitutional claim, e.g., *Boykin* error, until a collateral attack or sentence enhancement hearing. The *Boykin* colloquy is merely a prophylactic rule intended to eliminate unintelligent admissions of guilt but is not itself constitu-

tionally required. This Court has repeatedly stated that a voluntary guilty plea on advice of counsel may only be collaterally attacked by the defendant demonstrating ineffective assistance of counsel.

II. On collateral attack, since the standard for reversible error is greater than for direct appeal, the defendant (or habeas petitioner) must bear the burden of proof to demonstrate constitutional error. In this case, the record establishes that respondent received counsel, plead guilty with counsel's advice, and received the minimum sentence authorized as a result of the plea bargain. Respondent did not claim ineffective assistance of counsel nor claim that he did not know his constitutional rights regarding the plea. Respondent merely claimed that he did not remember if he knew his rights.

III. The Sixth Circuit erred by imposing a standard of proof on the prosecution of "clear and convincing" evidence since neither this Court nor other Federal Courts of Appeals have imposed that standard as a federal constitutional requirement.

IV. A court reviewing a collateral attack upon a guilty plea may properly consider the experience and knowledge gained by the habeas petitioner in previous criminal proceedings.

V. The Kentucky sentencing court, Kentucky Court of Appeals, and Federal District Court, all found that respondent knew his constitutional rights at the time of his 1981 guilty plea because of the knowledge he obtained at his 1979 guilty plea proceeding. Hence even if the Commonwealth had the burden of proof that burden was satisfied.

ARGUMENT

I. *Boykin* Did Not Establish A Ground For Collateral Attack.

In *Boykin* v. *Alabama*, 395 U.S. 238 (1969), this Court reversed a guilty plea conviction in which the death penalty was imposed on certiorari from a direct appeal taken to the Alabama Supreme Court. The Court held, U.S. at 242:

> It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. That error, under Alabama procedure, was properly before the court below and considered explicitly by a majority of the justices and is properly before us on review.

In cases subsequent to *Boykin*, the Court has ruled that the Eighth Amendment imposes additional safeguards in order to insure the reliability of a death sentence, but those procedures are not applicable to a non-capital case. See, e.g., *Harmelin* v. *Michigan*, 111 S.Ct. 2680 at 2701-2702 (1991); and *Sawyer* v. *Smith*, 110 S.Ct. 2822 (1990).

Approximately a year and a half after *Boykin* was decided, this Court upheld the guilty plea conviction in which the sentencing judge had not conducted a colloquy as described in *Boykin*. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Upholding the validity of the guilty plea, the Court cited *Boykin* and stated in part, U.S. at 31:

> The standard [for determining the validity of a guilty plea] was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. . . . That he

> would not have pleaded guilty except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

Subsequently, this Court has never ruled that the failure of the state court record to show a *Boykin* colloquy is by itself grounds for collateral relief under the federal habeas corpus statute. See Annotation, "Validity of Guilty Pleas - Supreme Court Cases," 25 L.Ed.2d 1025 at 1030 and at 1054-1055.

This Court has repeatedly emphasized that federal habeas corpus proceedings are not simply an appeal of a conviction. "[W]e have long and consistently held that a collateral challenge may not do service for an appeal." *United States* v. *Frady*, 456 U.S. 152, at 165 (1982). "We remain convinced that the burden of justifying federal habeas relief for state prisoners is greater than the showing required to establish plain error on direct appeal." *Engle* v. *Isaac*, 456 U.S. 107 at 134-135 (1982). "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot* v. *Estelle*, 463 U.S. 880, at 887 (1983). "[T]he presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Strickland* v. *Washington*, 466 U.S. 668, at 697 (1984). The Court has repeatedly recognized "the important distinction between direct review and collateral review" and that "the interests of comity and finality must also be considered in determining the proper scope of habeas review." *Teague* v. *Lane*, 489 U.S. 288, at 307 and 308 (1989). See also *United*

States v. *Jones*, 907 F.2d 456, at 480-484 (4th Cir. 1990) (Wilkinson, J., dissenting in part).

The Sixth Circuit's rule regarding collateral attacks on guilty pleas, exemplified by its opinion in this case, after having been reinvigorated by *Dunn* v. *Simmons*, 817 F.2d 1275 (6th Cir. 1990), *cert. denied*, 110 S.Ct. 1539 (1990), actually rewards a criminal defendant for delaying the attack upon his guilty plea. Under the Sixth Circuit's rule, a defendant *should not appeal* his conviction to contest the validity of his guilty plea. Instead he should wait until after he has been charged as a repeat offender (Ky.Rev. Stat. 532.080), so that he may collaterally attack his guilty plea and thereby impose on the prosecution the burden of "clear and convincing" evidence to establish the validity of his guilty plea, years after the plea was entered and even after its sentence was completely served.

In contrast to the Sixth Circuit, this Court, as previously noted, had repeatedly rejected any policy which has the effect of encouraging criminal defendants to forsake raising constitutional claims on direct appeal of their conviction in order to defer constitutional claims against that conviction for a collateral attack, which may be filed years after the conviction was entered, under Title 28 U.S.C. Section 2254 or 2255. In *Coleman* v. *Thompson*, 111 S.Ct. 2546 at 2561-2565 (1991), the Court reinstated the rule of *Daniels* v. *Allen*, 344 U.S. 443 at 482-489 (1953), to the extent of requiring "cause and prejudice" for failure to file an appeal within the time required by state law. Also see *Clark* v. *Texas*, 788 F.2d 309 (5th Cir. 1986); *Williams* v. *Arkansas*, 941 F.2d 672 (8th Cir. 1991); *Gilbert* v. *Scott*, 941 F.2d 1065 (10th Cir. 1991). In the *Daniels* case, the Court noted that the constitutionality of a state prisoner's detention "is not to be tested by the use of

habeas corpus in lieu of an appeal. To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." 344 U.S. at 485. Justice Jackson (concurring in the result) noted, 344 U.S. at 541 and 547:

> A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restriction by the state should be respected by federal courts.
>
> • • • •
>
> Presumably a federal court will not release a convict until he proves facts which show invalidity of his conviction.

The *Boykin* warning like the *Miranda* warning is merely a prophylactic rule, not itself required by the Constitution but which aids the reviewing Court in determining whether or not a constitutional violation occurred. In *Duckworth* v. *Eagan*, 492 U.S. 195 at 212 and 213 (1989), Justice O'Connor (concurring) pointed out:

> Our jurisprudence has long recognized a distinction between direct and collateral review, and I am not the first Justice of this Court to suggest that prophylactic rules should be treated differently in collateral proceedings than on direct review. [Citations omitted.] . . . As noted above, the Court has long recognized that habeas corpus has been traditionally governed by equitable principles, and thus has long defined the scope of the writ by reference to a balancing of state and federal interests[.] [Citations omitted.]

In *McClesky* v. *Zant*, 111 S.Ct. 1454 at 1468-1469 (1991), the Court noted:

> In habeas [proceedings], equity recognizes that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. . . . [W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication. . . . [W]e have taken care in our habeas corpus decisions to reconfirm the importance of finality.
>
> • • •
>
> Federal collateral litigation places a heavy burden on some federal judicial resources, and threatens the capacity of the system to resolve primary disputes. Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and *may establish disincentives to present claims when evidence is fresh.* [Citations and internal quotations omitted. Emphasis added.]

In *United States* v. *Timmreck*, 441 U.S. 780 (1979), the Court held that a violation of Rule 11 of the Federal Rules of Criminal Procedure in accepting the guilty plea did not authorize a collateral attack pursuant to Title 28 U.S.C. §2255. The Court stated in part, U.S. at 784:

> Nor can any claim reasonably be made that the error here resulted in a complete miscarriage of justice or in a proceeding inconsistent with rudimentary demands of fair procedure. Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial he would not have pleaded guilty. His only claim is of a technical violation of the rule. That claim could have been raised on direct appeal, but was not . There is no basis for allowing collateral attack to do service for an appeal. . . . For the concern with finality served

> by the limitation on collateral attack has special force with respect to convictions based on guilty pleas. Every inroad on the concept of finality undermines confidence in the integrity of our procedure; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new rules for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea. [Citations and internal quotations omitted.]

In *Mabry* v. *Johnson*, 467 U.S. 504 at 508-509 (1984), the Court upheld the validity of a guilty plea entered in Arkansas state court system and stated in part:

> It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked. It is also well settled that plea agreements are consistent with the requirements of voluntariness and intelligence because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained for exchange. It is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired.

In *Hill* v. *Lockhart*, 474 U.S. 52 at 56-57 (1985), the Court upheld the validity of a guilty plea in the Arkansas state court system and stated in part:

> Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel the voluntariness of the plea depends upon whether counsel's advice was within the range

> demanded of attorneys in criminal cases. As we explained in *Tollett* v. *Henderson,* 411 U.S. 258 (1973), a defendant who pleads guilty upon the advice of counsel may *only* attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [v. *Richardson,* 397 U.S. 759, at 267 (1970)]. [Citation and internal quotations omitted. Emphasis added.]

In *United States* v. *Broce,* 488 U.S. 563 at 569 (1989), the Court upheld the validity of a guilty plea in federal court and stated in part:

> [W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction, and the plea, as a general rule, foreclose the collateral attack.

In *Stano* v. *Dugger,* 921 F.2d 1125, 1141 (11th Cir. 1991) (en banc), the Eleventh Circuit upheld a guilty plea and death sentence. The Court quoted from *Frank* v. *Blackburn,* 646 F.2d 873 at 882 (5th Cir. 1980) (en banc), modified on other grounds, 646 F.2d 902 (5th Cir.) (per curiam), *cert. denied,* 454 U.S. 840 and stated in part:

> If a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea will be upheld on federal review. [Internal quotation marks omitted.]

Also see *Moore* v. *Jarvis,* 885 F.2d 1565 at 1573 (11th Cir. 1989) (Cox, J., dissenting), "It is clear in this circuit that the absence of a *Boykin* hearing does not, without

more, subject the convictions in question to collateral attack."; *Green* v. *United States*, 880 F.2d 1299 at 1305 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1322.

In *Winford* v. *Swenson*, 517 F.2d 1114 (8th Cir. 1975), *cert. denied*, 423 U.S. 1023, the Eighth Circuit upheld a guilty plea, predating *Boykin*, to the offense of second degree murder. The Eighth Circuit stated in part, 517 F.2d at 117-118:

> Indeed, the Supreme Court has made it clear that a counseled guilty plea made by a competent defendant aware of the nature of the charge against him and induced by his desire to limit the possible penalty will not be set aside simply because the defendant later learns of constitutional rights which he did not know at the time the plea was entered. A guilty plea entered with the assistance of counsel is presumptively valid. [Citations omitted.]

As the Sixth Circuit noted in *Hendron* v. *Cowan*, 532 F.2d 1081 (6th Cir. 1976), the majority of the federal courts of appeal have held that *Boykin* would not be applied retroactively. The fact that *Boykin* has not been applied retroactively and has not been cited in the opinions issued by this Court as an essential component of federal due process for collateral attack clearly indicates that the failure to comply with *Boykin* is not a fundamental defect justifying a collateral attack on a guilty plea. Also see *Boykin*, 395 U.S. at 247-249 (Harlan, J., dissenting), citing *Halliday* v. *United States*, 394 U.S. 831 (1969). "*Alford* made clear that lack of a verbatim transcript demonstrating that the trial judge admonished the defendant in a manner consistent with *Boykin* is not constitutionally required." *United States ex rel. Grundset* v. *Franzen*, 675 F.2d 870 at 877 (7th Cir. 1982). In *Brown* v. *Jernigan*, 622 F.2d 914

at 915 (5th Cir. 1980), *cert. denied*, 449 U.S. 958, the Fifth Circuit stated:

> Although by pleading guilty the defendant waives the right to a jury trial, the privilege against self-incrimination, and the right of confrontation, neither the Constitution nor any rule of criminal procedure requires express articulation and specific waiver of these rights before a guilty plea may be accepted.

Subsequent to *Timmreck*, this Court defined fundamental miscarriage of justice as "when a constitutional violation probably has caused the conviction of one innocent of the crime." *McClesky* v. *Zant*, 111 S.Ct. at 1470, citing *Murray* v. *Carrier*, 477 U.S. 878 at 485 (1986). Regarding the omission of rudimentary procedure standard of *Timmreck*, the Court has recognized the unconstitutional denial of counsel to an indigent and a coerced guilty plea may be collaterally attacked. See *Burgett* v. *Texas*, 389 U.S. 109 (1967); *Machibroda* v. *United States*, 368 U.S. 487 (1962).

Many of the other courts have limited the extent to which a counseled guilty plea may be collaterally attacked or effectively presumed the validity of a guilty plea on advice of counsel. *Robards* v. *Rees*, 789 F.2d 379 at 385-386 (6th Cir. 1986); *United States* v. *Wilkinson*, 926 F.2d 22 at 28-29 (1st Cir. 1991); *State ex rel. Collins* v. *Superior Court of Maricopa County*, 157 Ariz. 71, 754 P.2d 1346 at 1349 (1988) [limited to right to counsel violation]; *State* v. *Wright*, 198 Conn. 273, 502 A.2d 911 at 917 (1986); *State* v. *Cooley*, 471 N.W.2d 786 (Iowa 1991); *Hall* v. *State*, 273 Ind. 507, 405 N.E.2d 530 at 536 (1980) [limited to right to counsel violation]; *Corbett* v. *Commonwealth*, 717 S.W. 2d 831 at 835 (Ky. 1986) [limited to right to counsel violation]; *State* v. *Goff*, 418 N.W.2d 169 at 172 (Minn. 1988)

[limited to right to counsel violation]; *State* v. *Wilson*, 684 S.W.2d 544 at 547 (Mo.App. 1985) [limited to right to counsel violation]; *State* v. *Hargrove*, 104 N.C.App. 194, 408 S.E. 2d 757 at 759-760 (1991) [limited to right to counsel violation]; *Hanson* v. *State*, 716 P.2d 688 (Okla. Crim. 1986); *State* v. *Annino*, 46 Or.App. 743, 613 P.2d 84 (1980). Allowing a criminal defendant to collaterally attack a prior conviction during sentencing on a subsequent offense for any ground would result in retrying most prior convictions. See *United States* v. *Ruo*, 943 F.2d 1274 at 1276 (11th Cir. 1991), "It would approach the absurd to require the government to undertake to prove guilt all over again in every predicate conviction." Collateral attacks upon guilty pleas must be limited to cases where defendant demonstrates his apparent innocence, coerced guilty pleas, or the unconstitutional denial of counsel.

Raley failed to raise any defects regarding his 1981 guilty plea on direct appeal. The evidence presented by Raley in the 1987 collateral attack regarding the persistent felony offender charge does not establish a constitutional violation of sufficient magnitude to warrant collateral relief, i.e., an involuntary or incompetent guilty plea under the standards set forth in *Johnson* v. *Mabry, supra,* and *Hill* v. *Lockhart*. The state court's reliance upon a counseled guilty plea in determining respondent's sentence under the Kentucky persistent felony offender statute does not establish a sentence so unreliable as to constitute a federal due process violation. See *Townsend* v. *Burke*, 344 U.S. 736 (1948); *Zant* v. *Stephens*, 462 U.S. 862, at 902-903 (1983) (Rehnquist, J., concurring in judgment). As the Court noted in *Marshall* v. *Lonberger*, 459 U.S. 422, at 438, n. 6 (1983), "It has never been thought that decisions under the Due Process Clause establish this Court as a

rule-making organ for the promulgation of state rules of criminal procedure." [Citation and brackets omitted]. As required by the *Lonberger* opinion, the evidence in the state court record in this case is sufficient to demonstrate, and the two state courts found, that respondent was aware of the charge to which he pleaded guilty in 1981. (JA 17-18 HR 6).

A collateral attack is not a substitute for direct appeal. A higher standard of review is required for a collateral attack than direct appeal from the conviction. The Eleventh Circuit has apparently concluded that collateral review of a conviction solely for sentencing on a subsequent offense is not constitutionally required. See *United States* v. *Williams*, 954 F.2d 668 at 673 (11th Cir. 1992). Permitting defendants to collaterally attack a prior conviction introduced for sentencing encourages defendants to withhold constitutional claims until a subsequent offense proceeding in the hope that the prosecution will be unable to disprove such claims at that time. The precedents of this Court clearly establish that collateral use of a conviction by the prosecution is barred only when the defendant was unconstitutionally denied the right to counsel or coerced into pleading guilty. Detailed review of a prior conviction of the type required by the Sixth Circuit in connection with sentencing for a subsequent offense results in retrying the prior offense or trying the circumstances of a guilty plea to the prior offense, and rewards the defendant for his delay in presenting the claim. *Boykin* errors have never been recognized by this Court as ground for collateral attack. *Boykin* is merely a prophylactic rule and as such does not justify collateral relief.

Respondent's habeas corpus petition did not present an issue justifying federal habeas corpus review.

II. In a Collateral Attack Upon a Prior Conviction Offered By the Prosecution for Sentencing Enhancement, the Defendant Must Bear the Burden of Proving the Invalidity of the Prior Conviction.

In *Loper* v. *Beto*, 405 U.S. 473 (1972), this Court vacated the judgment of the Fifth Circuit allowing the conviction to stand and remanded for further proceedings because of evidence presented by Loper (the habeas petitioner) to the federal district court that he was in fact denied his right to counsel regarding his previous four felony convictions that were introduced by the state during his trial to impeach his testimony. Chief Justice Rehnquist filed a dissenting opinion in that case, 405 U.S. at 499-502, in which he was joined by then Chief Justice Burger, and Justices Blackmun and Powell, citing *Johnson* v. *Zebst*, 304 U.S. 458, at 468-469 (1938). Also see *Loper* v. *Beto*, 405 U.S. at 495-496 (Blackmun, J., dissenting); *Id.*, U.S. at 485 (White, J., concurring in judgment). The Chief Justice stated in part:

> In *Johnson* v. *Zebst*, [supra], one of the landmark habeas corpus decisions of this Court, Mr. Justice Black said: "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. [Footnote omitted.] Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a habeas hearing, he does meet this burden and convinces the court by a preponderance of the evidence that he neither had counsel nor properly waived his constitu-

tional right to counsel, it is the duty of the court to grant the writ."

* * *

Under *Johnson* v. *Zebst,* the burden in federal habeas corpus is upon [the petitioner] to prove to the satisfaction of the federal habeas judge that he did not waive the right to counsel. Here petitioner explicitly testified in a manner that, if the trial judge had chosen to believe him, would indeed have established that he did not waive his right to counsel in the Mississippi proceedings and thus those convictions were obtained in violation of *Gideon* v. *Wainwright* [372 U.S. 335 (1963)]. However, on the basis of his overall assessment of petitioner's credibility, the trial judge declined to believe these self-serving assertions. The uniform doctrine of the cases both in this Court and elsewhere, is that the finder of fact is entitled to wholly disbelieve the testimony of an interested witness.

The plurality of the Court in *Loper* v. *Beto,* 405 U.S. at 479, n.6, stated in part:

A dissenting opinion, *Post,* at 502, implies that the district court found that the *petitioner did not meet his burden of proving* that he had not waived his right to counsel in the Mississippi and Tennessee courts.

* * *

But despite these observations, the Court of Appeals, perhaps recognizing the error in the statement of the district court quoted above, did not rest its decision on a finding that the *petitioner failed to meet his burden of proving the invalidity of the prior convictions.* We reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either dismiss the case or affirm the decision below on the ground that the *petitioner did not meet his burden of proving that the prior convictions were invalid.* [Emphasis added.]

Also see *Phillips* v. *Commonwealth*, 559 S.W.2d 724 (Ky. 1977), and *State* v. *Annino*, 46 Or.App. 743, 613 P.2d 84 (1984), both discussing the *Loper* opinion.

In *Alvey* v. *Commonwealth*, 648 S.W.2d 850 at 860 (Ky. 1983), the Kentucky Supreme Court noted:

> There is a substantial difference between a situation in which the record in a guilty plea proceeding does not pass constitutional muster, and one in which post-conviction proceedings are filed after a defendant has already had an opportunity to raise issues about the validity of the earlier guilty pleas but has failed to do so. In the latter instance we should not afford the defendant a second bite at the apple. Moreover, we fail to see that there is any constitutional impediment in following such a course since we do not believe that the persistent felony offender type of situations was anticipated or was it meant to be encompassed in *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

Also see *Gross* v. *Commonwealth*, 648 S.W.2d 853 at 855-856 (Ky. 1983). In *Commonwealth* v. *Gadd*, 665 S.W.2d 915 (Ky. 1984), Gadd was convicted of being a persistent felony offender in the first degree and claimed that his prior convictions utilized to establish his status as a persistent felony offender were constitutionally deficient. The Kentucky Supreme Court upheld the conviction and stated in part, 655 S.W.2d at 917 and 918:

> A duly authenticated record of a judgment and conviction which is silent on the exercise of constitutional rights is prima facie evidence to establish the fact of conviction. It is a fact of conviction which the Commonwealth seeks to prove in introducing the judgment against a defendant charged as a persistent felon. KRS 532.080 does not specify that the Commonwealth must affirmatively prove both the fact of conviction

and that the previous conviction was not obtained by constitutionally impermissible means.

* * *

Phillips [v. *Commonwealth,* 559 S.W.2d 724 (Ky. 1977),] suggests that where the record is silent the defendant has both the burden of proving that the prior conviction was constitutionally invalid and the right to be heard on the subject during the progress of the current proceedings. . . . The question of some underlying constitutional infirmity should be raised by the defendant and decided before a trial is a threshhold issue to the admissibility of the evidence of the conviction at trial itself. . . . Although we recognize with reluctance that this may be a burden to the trial court, it is our belief that the United States Supreme Court decisions require this procedure.

Thus, the Kentucky Supreme Court concluded that the Commonwealth was not required to prove the validity of prior convictions offered for sentencing enhancement under the persistent felony offender statute. The Kentucky Supreme Court's ruling on this should have been accepted by the federal habeas court. See *Martin* v. *Ohio,* 480 U.S. 228, 232 (1987).

In *Curl* v. *Superior Court,* 51 Cal.3d 1292 at 1304 (1991), the California Supreme Court quoted from this Court's opinion in *Darr* v. *Burford,* 339 U.S. 200 at 218 (1950), as follows:

A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the state so departed from constitutional requirements as to justify a federal court's intervention to protect the rights of the accused.

The United States Courts of Appeal, including the Sixth Circuit, have unanimously placed the burden of proof on the defendant to establish the invalidity of a prior conviction used for purposes of establishing the defendant's criminal history score under the federal sentencing guidelines. See U.S.S.G. Commentary, Application note 6, Section 4A 1.2 and Section 4B 1.1. *United States* v. *Unger*, 915 F.2d 759 at 761 (1st Cir. 1990); *United States* v. *Davenport*, 884 F.2d 121 at 124 (4th Cir. 1989); *United States* v. *Woods*, 870 F.2d 285 at 287 (5th Cir. 1989); *United States* v. *Bradley*, 922 F.2d 1290 at 1297 (6th Cir. 1991); *United States* v. *Brown*, 889 F.2d 677 at 679 (7th Cir. 1990); *United States* v. *Dickens*, 879 F.2d 410 at 411-412 (8th Cir. 1989); *United States* v. *Newman*, 912 F.2d 1119 at 1121 (9th Cir. 1990). Also see *United States* v. *Clark*, 735 F.Supp. 861 (N.D. Ill. 1990) [placing burden on the defendant does not conflict with the decisions of this Court].

More recently, in cases involving collateral attacks on prior convictions in the state courts offered to enhance the defendant's sentence under either the Armed Career Criminal Act or Violent Career Criminal Act, Title 18 U.S.C. Section 924(e), Section 922(g), and Appendix Section 1202(a)(1), which imposes a minimum sentence of 15 years incarceration without the possibility of parole, the Seventh Circuit has imposed the entire burden of proof to establish the invalidity of a previous guilty plea conviction upon the defendant. *United States* v. *Gallman*, 907 F.2d 639 at 642-644 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1110; *United States* v. *Polk*, 908 F.2d 212 (7th Cir. 1990); *United States* v. *Boyer*, 931 F.2d 1201 at 1204-1205 (7th Cir. 1991), *cert. denied*, 111 S.Ct. 534 [Federal trial judge was entitled to discredit the defendant's own self-serving testimony]; *United States* v. *Henry*, 933 F.2d 553 at 559-560 (7th Cir.

1991); *United States* v. *Ferguson,* 935 F.2d 862 (7th Cir. 1991). Also see *United States* v. *Wilkinson,* 926 F.2d 22 at 28-29 (1st Cir. 1991), *cert. denied,* 111 S.Ct. 2813 [collateral attack on prior conviction offered for Career Criminal Act enhancement rejected without proof by government]. The Eleventh and Eighth Circuits have specifically adopted the Seventh Circuit's opinion in *Gallman* to require that the defendant seeking to invalidate a prior conviction offered under the Career Criminal Act must bear the burden of proof. *United States* v. *Ruo,* 943 F.2d 1274 (11th Cir. 1991); *United States* v. *Day,* 949 F.2d 973 at 982-983 (8th Cir. 1991).

Fifteen other states apparently follow a rule similar to that of Kentucky and California regarding the denfendant's burden in collaterally attacking a prior conviction offered for sentence enhancement. *State ex rel. Collins* v. *Superior Court, Maricopa County,* 157 Ariz. 71, 754 P.2d 1346 (1988); *Watkins* v. *People,* 655 P.2d 834 at 837 (Colo. 1983); *Lacy* v. *People,* 775 P.2d 1 at 6-7 (Colo. 1989), *cert. denied,* 110 S.Ct. 350; *State* v. *Wright,* 198 Conn. 275, 502 A.2d 911 at 917 (1986); *Hall* v. *State,* 273 Ind. 507, 405 N.E. 2d 530 at 536 (1980); *State* v. *Cooley,* 471 N.W.2d 786 (Iowa 1991); *State* v. *Goff,* 418N.W.2d 169 (Minn. 1988); *State* v. *Wilson,* 684 S.W.2d 544 at 548-549 (Mo.App. 1985); *Dressler* v. *State,* 819 P.2d 1288 (Nev. 1991); *State* v. *Desbiens,* 117 N.H. 433, 374 A.2d 651 at 653 (1977); *State* v. *Harper,* 126 N.H. 815, 498 A.2d 310 at 315 (1985) ["We conclude that the defendant has not met her burden under *Desbiens* of going forward with evidence"]; *State* v. *O'Neil,* 91 N.M. 727, 580 P.2d 495 at 497-498 (N.M.App. 1978); *People* v. *Harris,* 61 N.Y.2d 9 at 15, 471 N.Y.S.2d 61 at 63, 459 N.E.2d 170 at 172 (1983); *People* v. *West,* 110 A.D.2d 971, 488 N.Y.S.2d 268 at 270 (N.Y.App. 1985), appeal denied, 65

N.Y.2d 989 [applying *Harris*]; *State* v. *Hargrove,* 104 N.C. App. 194, 408 S.E.2d 757 (1991); *Hanson* v. *State,* 716 P.2d 688 (Okla.Crim. 1986); *State* v. *Annino,* 46 Or.App. 743, 613 P.2d 84 (1980); *State* v. *King,* 400 N.W.2d 878 at 879 (S.D. 1987); *Stuck* v. *Leapley,* 473 N.W.2d 476 (S.D., 1991) [discussing *King* and *Dunn* v. *Simmons*]. Also see *Ex Parte Scott,* 460 So.2d 1371 at 1374 (Ala. 1984) [prior conviction may not be collaterally attacked in habitual criminal proceeding]; *State* v. *Oliver,* 230 Neb. 864, 434 N.W.2d 293 at 297-298 (1989) [same].

As the Seventh Circuit observed in *United States* v. *Boyer, supra,* 931 F.2d at 1205:

> In our case, Boyer can only muster self-serving testimony to support his claim and even this testimony is equivocal. Boyer did not testify at the sentencing hearing that the trial court failed to admonish him, just that he could not remember receiving any warnings. As we stated in *Gallman,* the claim that one could not remember being informed of one's rights is not the same as claiming that one was not so informed . . . In any event, other evidence was available that Boyer did not pursue. For example, Boyer did not call trial counsel who represented him in his earlier plea hearings to testify about whether he received his warnings. Also, Boyer has never, until now, challenged the validity of his sentences; he did not take a direct appeal from the convictions, nor has he ever challenged his convictions collaterally. In fact he does not even now contend the convictions were invalid in and of themselves, only that they were invalid enough to preclude their use to enhance his present sentence. In conclusion, Boyer's presentation at the hearing was insufficient to carry his burden of proof on the question of the constitutionality of his prior convictions. [Citations and internal quotation marks omitted.]

In *United States* v. *Henry,* 933 F.2d at 559, the Seventh Circuit stated in part:

> [T]he district court found that Henry's pleas were "invulnerable to constitutional attack," *Henry,* 713 F. Supp. [1182] at 1192, because the constitution does not require the specific admonitions in *Boykin* as a condition precedent to the validity of a guilty plea. To reach this conclusion, the court observed that five years after *Boykin,* the Supreme Court proposed an amendment to the Federal Rule of Criminal Procedure 11 to prescribe the kind of admonition that should be given to a federal defendant as a precondition to a guilty plea. The proposed amendment stated that the court could comply with *Boykin's* mandate merely by explaining to defendants that they have the right to plead guilty and that, if they plead guilty, they waive the right to trial. In other words, a court need not comply with *Boykin* literally. All a court need do to give the constitutional required minimum warnings is to comply with the more general language of the Supreme Court's proposal. Several of the circuits similarly agree that the failure to advise a defendant of each right enumerated in *Boykin* does not automatically invalidate the plea.

In *Honeycutt* v. *Ward,* 612 F.2d 36 (2nd Cir. 1979), Honeycutt filed a habeas petition attacking his life sentence under the then existing New York habitual criminal statute because of prior convictions in New York, Oklahoma, and California, which he claimed to be constitutionally infirm. The Second Circuit stated in part, 612 F.2d at 41:

> Furthermore, the burden of proof is on Honeycutt to overcome the strong presumption of regularity in state judicial proceedings. His own self-serving declarations do not meet this burden.

In *Strozier* v. *Newsome*, 926 F.2d 1100, at 1104 (11th Cir. 1991), the Eleventh Circuit reiterated its previous rule placing the burden of proof on the habeas petitioner to establish that he did not validly waive counsel in collaterally attacking a previous conviction. In *Lowenfield* v. *Phelps*, 817 F.2d 285, at 296 (5th Cir. 1987), affirmed on other grounds, 484 U.S. 231 (1988), the Fifth Circuit held that the habeas petitioner would have the burden of proving the invalidity of a prior conviction introduced by the state in a capital sentencing proceeding.

The Sixth Circuit opinion in this case cites *Fox* v. *Kelso*, 911 F.2d 563 at 570 (11th Cir. 1990), to support the Sixth Circuit's position that the entire burden of proving the validity of a conviction involving a silent record falls on the state in the habeas corpus proceeding. However, the Eleventh Circuit's opinion in *Fox* v. *Kelso* does not, in fact, establish such a burden. The Eleventh Circuit opinion in that case, states in pertinent part:

> In habeas challenges to the validity of a guilty plea, however, courts uniformly assigned to the state (*once the petitioner satisfies his threshold burden of showing noncompliance* with the requirements of *Boykin* v. *Alabama*, 395 U.S. 238 [1969]), the burden of showing that the plea was obtained constitutionally. [Parenthetical phrase in original. Footnotes and citations omitted. Emphasis added.] Although the decision in *Clayton* v. *Blackburn*, 578 F.2d 117 (5th Cir. 1978), appears to place the burden on the petitioner, we conclude that it refers only to initial threshold burden on the petitioner to present a *prima facie* case. See [*United States ex rel Grundset* v.] *Franzen*, 675 F.2d [870] at 877 [7th Cir. 1982]. From the record, it is apparent that *Fox demonstrated* that his guilty pleas were not taken in accordance with the procedures mandated in *Boykin*,

> thereby *shifting to the state* the burden to prove that they were nonetheless knowing and intelligent. [Emphasis added.]

As the Sixth Circuit opinion points out the Eleventh Circuit in *Fox* v. *Kelso* collects a number of cases from other circuits. Eliminating the cases from the Sixth Circuit and eliminating cases involving guilty pleas prior to *Boykin* since *Boykin* has been deemed not to apply retroactively, *Hendron* v. *Cowan*, 532 F.2d 1081 (6th Cir. 1976) [collecting cases], only two circuits have apparently placed the initial burden on the prosecution to establish the validity of a guilty plea involving a silent or partially silent state court record. *United States* v. *Pricepaul*, 540 F.2d 417 (9th Cir. 1976); *Sena* v. *Romero*, 617 F.2d 579 at 580 (10th Cir. 1980), which expressly relies upon *Pricepaul*. In *Pricepaul*, the Ninth Circuit did place the initial burden on the prosecution to establish compliance with *Boykin* if the state court record was silent. However, the Ninth Circuit also stated as follows, 540 F.2d at 423:

> In these circumstances, it seems unfortunate to shift the burden to the government to prove compliance with *Boykin* if the defendant is unwilling to submit an affidavit specifically alleging that he did not voluntarily and intelligently waive the rights protected by *Boykin*. Because of this, if we were writing on a clean slate, we would hold that the burden shifts to the government to prove the guilty plea was voluntarily and intelligently made only after the person convicted (1) demonstrates that the record is silent as to whether the *Boykin* procedures were followed (neutral showing) (and (2)) offers an affidavit or other testimony alleging that in fact the required waiver procedure did not occur (positive showing). [Parenthetical phrases in original.]

Subsequently, the Ninth Circuit receded from the rule of *Pricepaul* and in effect now follows the above quoted dicta. *United States* v. *Goodheim*, 651 F.2d 1294 at 1297-1299 (9th Cir. 1981), appeal after remand, 686 F.2d 776 at 777-778 (9th Cir. 1982) [upholding prior conviction]; also see *United States* v. *Newman*, 912 F.2d 1119 at 1121-1122 (9th Cir. 1990) [placing burden on defendant]; *United States* v. *Dickens*, 879 F.2d 410 at 411-412 (8th Cir. 1989) [discussing *Goodheim II*, and other cases]. In *Goodheim*, 651 F.2d at 1298 and 1299, the Tenth Circuit stated in part:

> We next consider whether Goodheim established that his conviction was constitutionally infirm in the district court. * * * Goodheim has done more than establish that the record was silent with respect to *Boykin* waivers. His declaration, in combination with the silent record satisfies a more stringent showing we indicated in *Pricepaul* we would have preferred to require. [Citations and paragraph breaks omitted.]

As previously noted, the Seventh Circuit in *United States ex rel. Grundset* v. *Franzen*, 675 F.2d 870 at 877-880 (7th Cir. 1982), has placed the initial burden on the habeas corpus petitioner to establish the invalidity of a guilty plea under collateral attack. In that case the Seventh Circuit stated, 675 F. 2d at 880:

> We do not believe that an evidentiary hearing is necessary in this case. If such a hearing were held, *the initial burden would be on the petitioner.* Grundset, however, has repeatedly asserted that he is unable to offer any additional evidence as to what transpired at his guilty plea proceeding [other than the fact that he cannot remember]. In the absence of convincing independent evidence that Grundset was not admonished in accordance with *Boykin*, his petition for habeas relief must be denied. [Emphasis added.]

As the Eighth Circuit opinion in *United States* v. *Dickens*, 879 F.2d at 411-412 notes, in *Luna* v. *Black*, 772 F.2d at 488 at 450 (8th Cir. 1985), the Eighth Circuit placed the initial burden establishing invalidity of a guilty plea on the habeas petitioner. "Where, however, records of prior convictions are silent as to whether counsel was present at a critical stage and *where the accused introduces evidence* tending to show that he was not in fact so represented, the burden then shifts to the state to prove that the accused was represented." [Emphasis added.]

As the former Fifth Circuit noted in *Frank* v. *Blackburn*, 646 F.2d 873, at 882 (5th Cir. 1980) (en banc), modified in other grounds, 646 F.2d 902 (5th Cir. 1981) (per curiam), *cert. denied*, 454 U.S. 840 (1981):

> Because [Federal Criminal] Rule 11 is not binding on the states, a federal court reviewing a state court plea bargain may only set aside a guilty plea or plea agreement which fails to satisfy due process. If a defendant understands the charges against him, understands the consequences of a guilty plea, and voluntarily chooses to plead guilty, without being coerced to do so, the guilty plea and any concomitant agreement will be upheld on federal review.

The Fifth Circuit at least in certain contexts has upheld placing the burden of proof on the defendant (or habeas petitioner) even when a state conviction is collaterally attacked under Title 28 U.S.C. §2254. See *Bouchillon* v. *Estelle*, 628 F.2d 926, at 928 (5th Cir. 1980); *Walker* v. *Maggio*, 738 F.2d 714, at 717 (5th Cir. 1984), *cert. denied*, 469 U.S. 1112.

In *Hill* v. *Lockhart*, 474 U.S. 52, 56-57 (1985), this Court stated in part:

> Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. . . . [A] defendant who pleads guilty upon advice of counsel may only attack the voluntary and intelligent character of a guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [v. *Richardson*, 397 U.S. 759 (1970)]. [Citations and quotation marks omitted.]

As was also noted in *Hill* v. *Lockhart*, the convicted defendant (or habeas petitioner) bears the burden of proof to establish ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668, at 687-696 (1984). A defendant who belatedly attacks a guilty plea at which the advice and assistance of counsel was made available to him should be required to bear the burden of proof pursuant to *Hill* and *Strickland*.

The Sixth Circuit was in error in placing the entire burden of proof upon the Commonwealth of Kentucky to establish the voluntariness and validity of the respondent's prior guilty plea in connection with the persistent felony offender charge brought against him.

III. Even Assuming That the Prosecution Must Bear the Burden of Proof, the Standard for That Burden Should Be Preponderance Rather Than "Clear and Convincing" Evidence.

As previously noted in this brief, in *Johnson* v. *Zerbst*, 304 U.S. 458 at 468-469 (1938), the Court held that the habeas petitioner should be required to prove his claim by preponderance of the evidence. In *Colorado* v. *Connelly*, 479 U.S. 157 at 167-170 (1968), this Court expressly rejected

the "clear and convincing evidence" standard regarding the prosecution's burden of proof to establish a waiver of rights for a confession, and instead adopted the preponderance of the evidence standard. In *Patterson* v. *Illinois*, 487 U.S. 285 at 299, n.12 (1988), the Court noted that the *Miranda* waiver rule was in fact derived from the waiver rule for the Sixth Amendment right to counsel. Moreover, in contrast to a confession which is frequently made during police interrogation isolated from public view, a guilty plea is made or entered in a public court where the opportunity of persons not involved in the process to observe the proceedings is constitutionally required by the Sixth Amendment's guarantee of a public trial.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 at 85 (1986), this Court held that sentencing factors may be proved by preponderance of the evidence when authorized by state law. In *United States* v. *Newman*, 912 F.2d 1119 at 1122 (9th Cir. 1990), the Ninth Circuit relied on *McMillan* in concluding that a criminal defendant who contests the validity of a prior guilty plea conviction should be required to prove its invalidity by preponderance of the evidence.

The Sixth Circuit's opinion in this case is expressly based upon *Dunn* v. *Simmons*, 877 F.2d 1275 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1539 (1990). The Sixth Circuit's opinion in *Dunn* v. *Simmons* is based upon *Roddy* v. *Black*, 516 F.2d 1380 (6th Cir. 1975) [denying habeas corpus relief]. *Roddy* v. *Black*, was based primarily upon *Le Blanc* v. *Henderson*, 478 F.2d 481 (5th Cir. 1973), and *Des Bouillous* v. *Burke*, 418 F.2d 297 (1969). *Des Bouillous* expressly relied upon Wisconsin law to establish the "clearly convincing" burden of proof. See especially 418 F.2d at 300. Excluding *Des Bouillous*, *Roddy* and other Sixth Circuit opinions based upon *Roddy*, no case cited by the Sixth Cir-

cuit and no case cited for respondent has imposed upon the prosecution the "clear and convincing" burden of proof to establish the validity of prior convictions as a federal constitutional requirement.

Moreover, in this Court's opinion in *Sumner* v. *Mata*, 449 U.S. 539 at 551 (1981), the Court noted that the preponderance of the evidence standard is the usual standard regarding habeas corpus evidentiary matters. Also see *United States* v. *Lord*, 711 F.2d 887 at 891, n.3 (9th Cir. 1983), collecting cases and nothing that the preponderance standard usually applies regarding federal constitutional claims.

The Sixth Circuit opinion is in error in imposing a standard of clear and convincing evidence on the Commonwealth in habeas corpus proceedings and collateral attacks upon guilty pleas.

IV. The Defendant's Previous Experience in the Criminal Justice System Is Relevant In Determining the Voluntary and Intelligent Character of a Guilty Plea; the Sixth Circuit Erred By Ruling That Such Evidence Was Irrelevant.

In this case after the pretrial hearing on the validity of respondent's two previous guilty plea convictions introduced by the prosecution to establish the offense of being a persistent felony offender in the first degree, the sentencing judge expressly ruled against the respondent. (TE 60-61). The state court judge stated in part:

> On the basis of the record, the evidence and the totality of the circumstances shown at this hearing, the court finds that the defendant intelligently pled guilty in both of these prior instances, with full knowledge of the nature and consequences of a plea of guilty, and that the record is now complete to that extent, and

> therefore, the motion to dismiss those or to vacate those final sentences or not to utilize them in the present proceedings are overruled.

The Kentucky Court of Appeals reached the same conclusion after reviewing the record. (AP 32-33). The federal district judge after reviewing the record essentially agreed with the Kentucky Court of Appeals and the state trial court. (AP 24-25, HR 7). The Sixth Circuit rejected these rulings and ruled that a recidivist should be treated to the same "rights a first time offender possesses." (AP 17; 945 F.2d 137 at 142). The Commonwealth of Kentucky contends that the ruling of the Sixth Circuit is erroneous as a matter of law.

While the Commonwealth's petition for certiorari is pending in this case, a different panel af the Sixth Circuit upheld a somewhat similar ruling by the same federal district judge (Charles M. Allen), rejecting a motion to withdraw a guilty plea because of a violation of Federal Criminal Rule 11(c). *United States* v. *Evans,* 951 F.2d 729 at 730 and 732 (6th Cir. 1991). Sixth Circuit opinion stated in part, 951 F.2d at 732:

> While conceeding that he had not followed Rule 11(c) precisely in accepting the guilty plea, Judge Allen pointed out that Evans had recently been through a lengthy criminal trial in which he was found guilty, and had been sentenced by Judge Simpson. Therefore, Judge Allen concluded that Evans was aware of any constitutional rights that had not been specifically detailed at the plea session.

In *Fare* v. *Michael C.,* 442 U.S. 707, at 726 (1979), the Court in upholding the validity of a *Miranda* waiver and confession relied in part upon the juvenile defendant's previous experience with the criminal justice system. In

Marshall v. *Lonberger*, 459 U.S. 422 at 437 (1983) [reversing the Sixth Circuit], this Court cited Lonberger's previous experience in the criminal justice system as one of the factors in rejecting his claim of the invalidity of a previous guilty plea conviction. Also see *United States* v. *Henry*, 933 F.2d 553 at 560 (7th Cir. 1991), citing *Lonberger* for that proposition.

In *United States* v. *DeForest*, 946 F.2d 523 at 526 (7th Cir. 1991), the Seventh Circuit cited DeForest's previous experience in the criminal justice system as one of the factors to justify rejecting his challenge to a previous guilty plea offered for sentencing enhancement. In *Stano* v. *Dugger*, 921 F.2d 1125, at 1142-1143 (11th Cir. 1991) (en banc), the Eleventh Circuit rejected Stano's challenge to his guilty plea which resulted in a death sentence and cited as one of the factors to uphold the validity of the guilty plea that Stano had previous experience in the criminal justice system and had previously been convicted of first degree murder and sentenced to life imprisonment. In *LoConte* v. *Dugger*, 847 F.2d 745, at 751 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, the Eleventh Circuit concluded, "[A] guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing." Also see *United States* v. *Hafen*, 726 F.2d 21, at 25 (1st Cir. 1985), *cert. denied*, 466 U.S. 926, upholding a waiver of the right to counsel based in part upon defendant's previous experience in the criminal justice system. As noted in the Kentucky Court of Appeals opinion in this case, the Kentucky courts have also relied on defendant's previous experience in the criminal justice system in upholding guilty pleas (AP 30), *Lynch* v. *Commonwealth*, 610 S.W.2d 902 at 905 (Ky.App. 1980).

The Sixth Circuit erred as a matter of law in rejecting the conclusion of the state sentencing judge, the Kentucky Court of Appeals, the federal district judge, and authority from this Court that the defendant's previous experience in the criminal justice system was relevant in ascertaining the validity of a guilty plea.

V. The Kentucky Courts and Federal District Court Correctly Concluded That Respondent's 1981 Guilty Plea Conviction Was Valid.

The evidence in this case regarding the 1981 conviction was that appellant was represented by counsel, previously pleaded guilty and had executed a waiver of rights form in connection with the previous guilty plea, and that the 1981 guilty plea was sufficient to negotiate a minimum sentence. The 1981 guilty plea (Case No. 81-CR-0269) resulted in a sentence of five years for the offense of third degree burglary (Ky.Rev.Stat. 511.040) and second degree persistent felony offender (Ky.Rev.Stat. 532.080). (HR 6; JA 17-25). Five years would be the minimum sentence possible for a third degree burglary charge enhanced as a second degree persistent felony offender. [Class D felony (1 to 5 years) enhanced to Class C felony (5 to 10 years).] At one point during the testimony on the 1981 guilty plea respondent acknowledged that his attorney had informed him that he had been charged as a first degree persistent felony offender. (TE 17). Respondent also acknowledged that he did not have any witnesses to call to testify at trial regarding the burglary charge. (TE 38-39). Respondent also admitted that he had signed the Commonwealth's guilty plea negotiation form [JA 17-18] (TE 39). The essence of respondent's testimony regarding the 1980 guilty plea was simply that he did not remember whether or not he could

have been advised of his rights by the judge in connection with the guilty plea. (TE 42). In this respect respondent's testimony is similar to testimony rejected by the Seventh Circuit in cases arising under the Career Criminal Act, 18 U.S.C. §922(g)(1) and §924(e)(1). *United States* v. *Gallman*, 907 F.2d 639 at 643 (7th Cir. 1990); *United States* v. *Boyer*, 931 F.2d 1201 at 1205 (7th Cir. 1991). In *Clayton* v. *Blackburn*, 578 F.2d 117 at 119-120 (5th Cir. 1978), the Fifth Circuit upheld the guilty plea with an incomplete state court record in the face of similar testimony by the habeas petitioner that he could not remember whether he had been advised of his rights and such testimony was sufficient to establish a constitutional violation.

Appellant presented no evidence and no suggestion of any evidence that the advice the received from legal counsel was not within the constitutional standards required for effective assistance of counsel under the Sixth Amendment. See *Hill* v. *Lockhart*, 474 U.S. 52 at 56-57 (1985). Appellant failed to carry his burden or even attempt to carry his burden under that standard. The Sixth Circuit erred by rejecting the findings and conclusions of the state sentencing judge, the Kentucky Court of Appeals, and the federal district judge under the standards established by this Court in *Marshall* v. *Lonberger*, *supra*, and *Sumner* v. *Mata*, 449 U.S. 552 (1981). In *Winford* v. *Swenson*, 517 F.2d 1114 at 1118 (8th Cir. 1975), *cert. denied*, 423 U.S. 1023, the Eighth Circuit concluded:

> It is clear from the specific findings of the state court judge that Winford's plea was an effectively and accurately counseled plea made with full knowledge of the nature of the charge. These findings were entitled to a presumption of correctness with the burden on the habeas petitioner to establish that such factual deter-

> minations were erroneous. That burden was not met on the record in this case. . . . Invoking the language of *Townsend* v. *Sain*, 372 U.S. 293 (1963), Winford contends that Judge Wangelin erred in denying him a de novo evidentiary hearing since the state court had not expressly resolved all issues of fact, i.e., whether the plea was voluntary and understanding. . . . Nevertheless, *Townsend* expressly recognizes that federal courts sitting in habeas corpus may, in the absence of clear expression by the state court, reconstruct implied findings of fact and interpolate the constitutional criteria applied. [Citations, footnotes, and paragraph breaks omitted.]

Respondent's conviction and sentence as a first degree persistent felony offender under Kentucky law should be upheld by this Court because of the findings by the state court's and Federal District Court. The Sixth Circuit erred by ruling that all repeat offenders must be treated as first time offenders in reviewing the validity of their guilty pleas.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit rendered in this case should be reversed.

Respectfully submitted,

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ADDENDUM

The Due Process Clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law[.]

Title 28 U.S.C. Section 2254 provides:

> (a) The Supreme Court, a Jusitce thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process of the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof

were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual deter-

mination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Kentucky Penal Code, Kentucky Revised Statutes 532.080. Persistent felony offender sentencing. — (1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (5) or (6) of this section shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose.

(2) A persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and

(c) That the offender:

1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or

2. Was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted; or

4. Was in custody from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or

5. Had escaped from custody while serving any of the previous felony convictions at the time of commission of the felony for which he now stands convicted.

(3) A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one (1) year or more or a sentence to death was imposed therefor; and

(b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and

(c) That the offender:

1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted; or

2. Was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation, parole, conditional discharge, conditional release, or any other form or legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted; or

4. Was in custody from the previous felony conviction at the time of commission of the felony for which he now stands convicted; or

5. Had escaped from custody while serving any of the previous felony convictions at the time of commission of the felony for which he now stands convicted.

(4) For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

(5) A person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted. A person who is found to be a persistent felony offender in the second degree shall not be eligible for probation, shock probation or conditional discharge.

(6) A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:

(a) If the offense for which he presently stands convicted is a Class A or Class B felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than twenty (20) years nor more than life imprisonment; or

(b) If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

(7) A person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten (10) years.

Supreme Court, U.S.
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No. 91-719

In The

Supreme Court of the United States

October Term, 1991

AL C. PARKE, WARDEN

Petitioner,

v.

RICKY HAROLD RALEY

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment, requires that the prosecution prove the validity of a prior conviction offered for sentence enhancement by "clear and convincing evidence", when the state court's record of the prior conviction shows that the defendant was represented by counsel but is silent as to whether a *Boykin v. Alabama*, 395 U.S. 238 (1969) colloquy was given?

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The Respondent, Ricky Harold Raley, requests that the Court affirm the decision of the United States Court of Appeals for the Sixth Circuit and states as follows.

STATEMENT OF THE CASE

On May 28, 1987, Ricky Raley entered a conditional plea of guilty to second degree robbery and first degree persistent felony offender. Mr. Raley entered a conditional plea because Mr. Raley asserted that the two convictions being used to establish that he was a persistent felon were constitutionally invalid. Both of the convictions were obtained as a result of guilty pleas.

The first conviction was entered on January 3, 1980, in case No. 79-CR-1214 and imposed a sentence of five years on each count of the three count indictment. The second conviction was entered on October 8, 1981, in case No. 81-CR-0269 and imposed a five year sentence for third degree burglary and of being a second degree persistent felony offender. (AP 22-25)

Mr. Raley sought to have the convictions suppressed and filed a motion to suppress because the convictions were not knowingly and voluntarily entered (AP 39). A hearing was granted on the Motion to Suppress. At the hearing, the prosecutor filed certain copies of the judgments in the 1979 and the 1981 cases. (AP 39) The trial court then advised appellant that this caused the burden of going forward to shift to him. (AP 39) Appellant admitted that under the precedents of the Kentucky Supreme Court, the trial judge correctly stated the law. (AP 40) However, appellant advised the Court of his written motion which maintained that *under federal law* where the record is silent as to a colloquy between the defendant and the court pursuant to a guilty plea

entered, the convictions are presumed constitutionally invalid. (AP 40) In order to comply with the Kentucky law, Mr. Raley then produced evidence through his own testimony. (AP 40) The prosecution, for its part, relied on cross-examination of the appellant and on the testimony of one of the trial attorneys who had previously represented Mr. Raley.

After the State trial court denied Mr. Raley's motion to suppress, he entered a conditional guilty plea in which he reserved the right to appeal the determination of the trial court concerning the motion to suppress the PFO conviction.

Mr. Raley appealed his conviction and the Kentucky Court of Appeals affirmed Mr. Raley's conviction in a slip opinion rendered April 22, 1988. *Raley v. Commonwealth,* 87-CA-1359-MR, "Not to be Published". Relying upon *Dunn v. Commonwealth,* Ky., 703 S.W.3d 874, 876 (1985), *cert. denied* 107 S.Ct. 121, the Kentucky Court of Appeals found that the trial court properly placed the burden of production upon Mr. Raley. Relying on other cases, the Kentucky Court of Appeals concluded that the Commonwealth met its burden of proof concerning the validity of Raley's prior guilty pleas. The *Dunn* case was subsequently disapproved by the Sixth Circuit on federal habeas review, in *Dunn v. Simmons,* 877 F.2d 1275 (6th Cir. 1989), *cert. denied* 108 L.Ed.2d 778.

After the Kentucky Supreme Court denied review, Mr. Raley filed a Petition for Habeas Corpus with the United States District Court.

The United States District Court reviewed the petition and ordered the record to be supplemented with additional documentation concerning the guilty pleas of 1979 and 1981. The United States District Court, then

concluded that "the record plainly reflects that at the time of his guilty plea in late 1979, Mr. Raley was fully advised of his constitutional rights, and signed a paper admitting that he had been so advised. His understanding of those rights cannot be assumed to have evaporated in a period of less than two years between that conviction and his 1981 conviction. Furthermore, the written record plainly shows that Mr. Raley was explicitly informed of the charges against him in 1981." (AP 61)

Thereafter, Petitioner filed his notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit.

The United States Court of Appeals affirmed in part and reversed in part, and granted a conditional writ of Habeas Corpus. The State of Kentucky then filed a Petition for Certiorari with this Court.

STATEMENT OF THE FACTS

Mr. Raley stated at the suppression hearing that the two previous pleas, upon which the PFO conviction is based, were not knowingly and voluntarily entered. During the hearing on the motion to suppress the introduction of the convictions, the following evidence was submitted.

As to the 1979 conviction Mr. Raley did not recall going over any papers with Thom Marshall, his attorney at that time. He also did not recall Marshall informing him of any rights that he might be giving up. About the only thing that Marshall told him was that if he pleaded guilty he would get 5 years on each charge. (AP 43-47) With reference to the 1981 conviction, Mr. Raley stated that he had been represented by Mr. T. Clay. (AP 47) He stated he had never had any discussions with Clay before

the date on which the plea was entered in that case. (AP 48) Mr. Raley also testified that although he was only charged as a second degree persistent felony offender, Mr. Clay told him that he was charged as a *first degree* persistent felon and that the prosecutor would reduce the charge to second degree persistent felon if he would plead guilty. (AP 48-49 and AP 62).

The Commonwealth's witness, Thom Marshall, stated that he had no specific recollection of ever representing Mr. Raley. (AP 67) However, this witness stated that he did sign the form that was shown to the trial judge which certified that he as the lawyer for the defendant had advised the defendant of all of his constitutional rights. (AP 48) Mr. Marshall also testified that he honestly could not recall any of the proceedings nor could he honestly recall ever meeting Mr. Raley. (AP 67)

There was some evidence concerning sources of knowledge outside the judicial system from which Mr. Raley might have learned of his rights. Mr. Raley testified that in all of his district court cases for public intoxication, he never stood trial but instead simply pleaded guilty and paid a fine. (AP 42) No one in District Court ever asked Mr. Raley if he understood his rights. Rather, in district court they simply asked if he was intoxicated at the time of the plea. (AP 42) At the time of the first circuit court case in 1979, Mr. Raley had never been charged with a felony nor had he ever been to circuit court. (AP 43) Before the entry of the 1979 plea, Mr. Raley had never had a trial of any sort, and had never attended a trial either as a spectator or witness. (AP 43) Mr. Raley specifically testified that in 1979 he did not know he had a right to a jury trial, a right to confront and cross-examine witnesses, a right to remain silent, and a right to demand

the Commonwealth to prove its case. He further testified that he did not know these rights in 1981. (AP 51-52)

The most important piece of evidence in this case, the guilty plea sheet to which all parties and the trial court referred, was not introduced into evidence at the suppression hearing, and was not found in the record on appeal in the State proceedings.

Mr. Raley's testimony as to what he understood and wished at the time of these pleas showed only that he desired to take advantage of what he considered to be "good" deals in light of the possible sentences that could result. (AP 51) But, he did not know he had an alternative to taking the deal. (AP 57). He had no knowledge of the elements of the crime or of all of his constitutional rights.

SUMMARY OF ARGUMENTS

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. (1969), the Supreme Court found that the due process clause of the Fourteenth Amendment required a State trial judge to spread on the record the prerequisites of a valid waiver before a guilty plea could be accepted.

The issue here is whether the record is sufficient to show that there was a voluntary and intelligent waiver by guilty plea of the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Boykin*, 395 U.S. 243; 89 S.Ct. 1712; *United States v. Goodheim*, 651 F.2d 1294 (9th Cir. 1991).

1. The Petitioner raises for the first time in its brief with this court the argument that the Respondent is collaterally attacking his 1979 and 1981 convictions and that *Boykin v. Alabama*, as a prophylactic rule, does not apply. Petitioner did not raise this argument with the District

Court or the circuit Court of Appeals, and, therefore, it is not properly before this court.

2. The Respondent is not collaterally attacking his 1979 and 1981 convictions. He seeks no relief from the sentences imposed upon him by the courts in those two cases. He is attacking the PFO conviction that was entered in 1987.

3. When the State of Kentucky seeks to use prior guilty pleas to convict a defendant of the present crime of being a PFO, and the defendant asserts that those prior guilty pleas were not knowingly and intelligently entered into and that he was unaware of his constitutional rights at the time that he entered into those pleas, then due process dictates that the defendant has a right to be heard. Secondly, due process dictates that the burden to establish the constitutional validity of the guilty pleas is upon the State who desires to use those pleas to convict the defendant, as they are elements of a criminal offense created by the State Legislature in KRS 532.080. Thirdly, the standard of proof placed upon the state is clear and convincing. Lastly, the State may not meet its burden of proof by the use of a presumption.

The Kentucky Legislature specifically provides that only prior convictions may be used to enhance a defendant's sentence. PFO status in the State of Kentucky is a separate criminal offense. All elements of a crime must be proven beyond a reasonable doubt unless the State Legislature declares otherwise. The Legislature has not allowed the courts to use other indicators of criminal conduct to enhance a defendant's sentence. The Legislature has recognized the significance and important value of a conviction. The Legislature, like the Supreme Court in *Boykin*, supra, has recognized that a conviction is more

than an admission that an accused did various acts. By allowing only convictions to be used to enhance a sentence, the Legislature has relied upon the Judiciary to do its job to guarantee that only reliable and trustworthy facts are used to enhance a defendant's sentence. When a conviction is based upon a guilty plea that is not knowingly and intelligently entered into, it is not reliable and trustworthy. The Judiciary has a duty to the Kentucky Legislature and to its citizens under the due process clause of the United States Constitution to only use constitutionally valid convictions when enhancing a defendant's sentence.

ARGUMENTS

I

THE PETITIONER'S ARGUMENT THAT *BOYKIN* DID NOT ESTABLISH A GROUND FOR COLLATERAL ATTACK SHOULD NOT BE ADDRESSED BY THIS COURT

The Petitioner in its brief to this court asserts that *Boykin* did not establish a ground for collateral attack. The Petitioner argues for the first time that Raley is collaterally attacking the 1979 and 1981 convictions in his Petition for Writ of Habeas Corpus, and that *Boykin v. Alabama* does not apply. The Petitioner did not argue before the U.S. District Court or the U.S. Court of Appeals that *Boykin* did not establish a ground for collateral attack.

This argument appears to arise out of this Court's decision of *Stone v. Powell*, 428 U.S. 465 (1976). *Stone v. Powell*, is cited in the United States Amicus Brief to support its argument that *Boykin* creates a prophylactic rule (see dissent of Justice Harlan, *Boykin v. Alabama*, 395 U.S.

at 238, supra). Petitioner and the United States assert that the rule in *Boykin* is designed to protect constitutional guarantees and that as such it is only enforceable on direct review but not on collateral attack.

The State and the Amicus Brief of the United States characterize this as a "Burden of Proof on Habeas" case. The realty of the matter, however, is that it is not such a case at all. Instead, this is a "burden of proof in the State trial court" case. The distinction is important.

In this case, the habeas petition of Mr. Raley does not seek relief from the 1979 or 1981 convictions. Instead, he challenges the use of these convictions by the State to convict him of a new crime. Indeed, Mr. Raley would be limited in his challenge of the 1979 and 1981 convictions on Habeas review under the reasoning of *Maling v. Cook*, 109 S.Ct. 1923 (1989). The challenge of the State's use of these convictions is an entirely separate question from the issue of who has the burden of proof in federal habeas cases.

The Commonwealth of Kentucky did not previously raise the issue of Mr. Raley collaterally attacking the 1979 and 1981 convictions on habeas review and *Boykin*'s application to this collateral attack on the basis that it *may* be considered a prophylactic rule. Likewise, this issue should not be addressed by this Court.

In several of this Court's recent decisions, the Court has stated that it would not review issues that had not been addressed by the Court of Appeals. In *Hudson v. McMillian*, 112 S.Ct. 995 (1992), this Court refused to address respondent's arguments that were not addressed by the Fifth Circuit and not presented by the question on which the Court granted certiorari.

In *City of Springfield, Mass. v. Kibbe,* 107 S.Ct. 1114 (1987) the Court stated:

> "We ordinarily will not decide questions not raised or litigated in the lower court. See *California v. Taylor,* 353 U.S. 553, 556 N2 77 S.Ct. 1037, 1029, N2 1 L.Ed.2d 1034 (1957)." *Id* 1115.

In the case at hand, the Petitioner has raised an issue that was not before the Sixth Circuit and that, likewise, has not been addressed by the lower courts. This issue of whether or not *Boykin* is a prophylactic rule that does not apply in habeas petitions should not be addressed by this Court. This Court should limit its review to whether the Commonwealth of Kentucky must prove by clear and convincing evidence the validity of prior convictions that are being offered for sentence enhancement. And, whether the State may carry its burden of proof by use of a presumption.

II

THE RESPONDENT IS NOT COLLATERALLY ATTACKING HIS 1979 AND 1981 CONVICTIONS, BUT CHALLENGES THE USE OF THESE CONVICTIONS BY THE STATE TO CONVICT HIM OF A SEPARATE CRIME

As stated in the preceding argument, the Respondent herein is not seeking relief from his 1979 or 1981 convictions. The Respondent has served his time for those convictions and has not sought habeas relief in the Federal Court to be relieved from those convictions. The Commonwealth of Kentucky presents the argument that the Respondent is collaterally attacking these convictions in the habeas proceeding and that by doing so the Respondent seeks a reward or tactical advantage by waiting to

attack these convictions when they are being used in the PFO proceeding.

The Petition asserts that:

> "The Sixth Circuit's rule regarding collateral attacks on guilty pleas, exemplified by its opinion in this case, after having been reinvigorated by Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1990), cert denied, 110 S.Ct. 1539 (1990), actually rewards a criminal defendant for delaying the attack upon his guilty plea. *Instead he should wait until after he has been charged as a repeat offender (Ky. Ev. Stat. 532.080), so that he may collaterally attack his guilty plea and thereby impose on the prosecution the burden of "clear and convincing" evidence to establish the validity of his guilty plea, years after the plea was entered and even after its sentence was completely served."* (Emphasis added)

This argument is preposterous. The thought that a defendant would wait until he had served a sentence for a crime and been released from custody to attack his conviction is ludicrous. This argument loses even more credibility when it assumes a defendant would be convicted of a second crime to gain the tactical advantage of imposing upon the prosecution the burden of "clear and convincing" evidence to establish the validity of the guilty pleas to the first conviction. This argument also highlights why the case at hand is not a collateral attack on the 1979 and 1981 convictions. Mr. Raley will not receive any relief from the 1979 and 1981 convictions. If the State fails to prove by clear and convincing evidence that the guilty pleas that support the convictions are constitutionally valid, then he is relieved of the PFO convictions but not from the previous sentence he has served.

III

WHEN THE COMMONWEALTH OF KENTUCKY OFFERS A PRIOR CONVICTION AS EVIDENCE TO CONVICT A DEFENDANT OF THE PRESENT CRIME OF BEING A PERSISTENT FELONY OFFENDER UNDER KRS 532.080 AND THE RECORD OF THE PRIOR CONVICTION IS SILENT, THE COMMONWEALTH HAS THE BURDEN OF PROVING THE PRIOR CONVICTION IS CONSTITUTIONALLY VALID

The Supreme Court in *Boykin v. Alabama* established the rule that the record must show that a guilty plea was voluntarily made. The Court based its decision on the fact that several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a State criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to states by reason of the Fourteenth Amendment. Second is the right to trial by jury and third is the right to confront ones accusers. The Douglas Court, in deciding *Boykin*, referenced the 1938 Supreme Court case of *Johnson v. Zerbst*, 304 U.S. 458, (1938), see *Boykin*, 395 U.S. 243 Note 5, which stated that a defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accuser. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege, *Johnson v. Zerbst, id* 464. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Id* at 466.

The Court in *Boykin* expanded on the *Johnson v. Zerbst* decision and ruled that when a state trial judge leaves an inadequate record for any review later sought, there is reversible error. Most importantly, the Douglas Court ruled that a court cannot presume a waiver from a silent record. *Boykin*, supra, 395 U.S. at page 243.

The Petitioner has postured this case as a simple habeas action whereby a prisoner wants relief from a bad plea. But, this case is not such a case and the *Burden of Proof* issues that arise out of *Johnson v. Zerbst*, supra, do not apply. Under *Johnson*, the burden in Federal Habeas Corpus is upon the petitioner to prove to the satisfaction of the Federal Habeas Judge that he did not waive his rights. This case is concerned with the Commonwealth of Kentucky using prior convictions to convict a man of the *present* crime of being a Persistent Felony Offender (hereafter referred to as PFO).

A PFO in the State of Kentucky is a separate offense. (See KRS 532.080, Addendum to Brief of the Petitioner.) The Kentucky statute calls for the offense to be determined by a jury in a separate bifurcated proceeding immediately after a defendant has been convicted of a new felony. The Legislature drafted the statute to read as follows:

> "(1) When a defendant is found to be a persistent felony offender, the jury, in lieu of the sentence of imprisonment assessed under KRS 532.060 for the crime of which such person presently stands convicted, shall fix a sentence of imprisonment as authorized by subsection (5) or (6) of this section. When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (5) or (6) of this section

> shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose." KRS 532.080.

The Kentucky courts have held that each element of the offense of being a PFO must be proven beyond a reasonable doubt. *Callison v. Commonwealth,* 706 S.W.2d 434 (Ky. Ct. App.1986); *Hon v. Kentucky,* 670 S.W.2d 851, 853 (Ky. 1984). (Because the Kentucky Legislature has created PFO status as a separate offense, this case is clearly distinguishable from those cases cited by the Petitioner and the United States, dealing with enhancement of sentences under the Federal Sentencing Guidelines.) Under Kentucky's PFO statute the question of whether a defendant has been convicted of a prior felony is a jury question. The factual issue of whether Mr. Raley was convicted of a prior felony is linked closely to the legal question of whether or not Raley's prior convictions are "legally valid".

But, the issue here is not the factual issue submitted to the jury of whether Mr. Raley was convicted, but the legal issue of whether the prior convictions are valid constitutionally.

When a defendant is convicted by entering a plea of guilty, the waiver of three constitutional rights takes place. See, *Griffith v. Wyrick,* 527 F.2d, 109 (8th Circuit 1975); *McCarthy v. United States,* 394 U.S. 459, 466; 89 S.Ct. 1166; 222 L.Ed.2d 418 (1969); *Boykin v. Alabama,* supra; *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). There is a strong presumption against the validity of waivers of

constitutional rights, and the acceptance of a plea of guilty must be approached with the utmost solicitude. *VonMoltke v. Gillies*, 322 U.S. 708, 723; 63 S.Ct. 316; 92 L.Ed. 309 (1948); *Knight v. State of Minnesota*, 484 F.2d 104, 106 (8th Cir. 1973). Because of this strong presumption against the waiver of constitutional rights, it is important that a court's records affirmatively show, under the totality of the circumstances, that a plea of guilty was voluntarily entered. See *Griffith v. Wyrick*, supra, 112; *Boykin*, supra. Using this well established principle that there is a strong presumption against the waiver of constitutional rights, the Supreme Court has held that to presume a waiver of the constitutional right to counsel is impermissible. See *Carnley v. Cochran*, 369 U.S. 506 (1962) and *Burgett v. Texas*, 389 U.S. 109 (1967).

In *Burgett*, supra, the petitioner was charged in a five count indictment and convicted of assault with malice aforethought with intent to murder; repetition of offense. The first count charged assault. The other counts, pursuant to the Texas recidivist statutes, alleged prior felony convictions. The petitioner objected to the prosecution offering into evidence two differing certified copies of Tennessee convictions and a certified copy of the indictment in the prior Texas prosecution. The petitioner objected to the first and second version of the Tennessee judgments because he was not represented by counsel. His objection was upheld as to the first version of the Tennessee judgment, but it was overruled as to the second version which stated petitioner had "appeared in proper person" but did not add (as did the first version) "without counsel". The Supreme Court reviewed the state proceedings and found that the convictions were "presumptively void", because the record was silent as to

whether or not the petitioner had waived his Sixth Amendment right to counsel. The Court recognized that the states are free to create rules of evidence and of procedure as they choose, but none of these evidentiary or procedural rules may infringe upon a guaranteed Federal Constitutional right. The Court stated:

> "The recent right to counsel cases, starting with *Gideon v. Wainwright*, 372 U.S. 335, are illustrative of the limitations which the Constitution places on state criminal procedures." *Burgett*, supra, at 389 U.S. 114. (Emphasis added)

Likewise here, Mr. Raley's 1979 and 1981 convictions are presumptively void because the records of each conviction are silent and each conviction is based upon a guilty plea which by its very nature entails the waiver of three constitutional rights.

Using the two prior convictions here to find Mr. Raley guilty of PFO status would not only violate this Court's decision in *Burgett* and *Boykin*, but would most importantly violate due process because it would allow the state to use unreliable and untrustworthy evidence to convict a person charged with a crime. It is, thus, submitted that the Sixth Circuit is correct in its finding that *Boykin*, places the burden on the Commonwealth to prove the constitutional validity of the prior pleas where the record is silent. This conclusion is correct because, as in *Burgett*, a constitutionally protected right is in question. In *Burgett*, it was the defendant's right to counsel, and in *Boykin* it was defendant's knowing and intelligent waiver of his right to a jury trial, to confront his accusers, and to remain silent. Similarly here, Mr. Raley alleges that he did not knowingly and intelligently waive his right to confront his accusers, to remain silent, and to a jury trial.

On similar grounds, this Court has held that before a state may use a defendant's confession as evidence in a trial, that state must hold a hearing to decide whether the defendant's confession was voluntary and reliable. See *Jackson v. Denno*, 378 U.S. 368 (1964). Mr. Raley is entitled to a similar hearing where greater rights are at stake than are involved with an involuntary confession being used as evidence in the trial. In *Loper v. Beto*, 405 U.S. 364; 92 S.Ct. 1014; 31 L.Ed.2d 374 (1972), the Court in deciding that case recognized that the use of invalid prior convictions as evidence for purposes of impeachment only goes to credibility and is not so serious as the use of a conviction for enhancement which may add years of imprisonment to the sentence of a defendant. *Loper*, 405 U.S. at page 1017. Likewise here, due process would require that Mr. Raley should be given the same protection that *Jackson v. Donna*, supra, creates for the use of confessions in a trial.

Jackson v. Denno, is important to review because it is procedurally very similar to the case at hand. In *Jackson* the defendant was denied a proper hearing by the Trial Court in regard to the constitutional validity of his confession. After exhausting his state remedies, the defendant petitioned for federal habeas review. The habeas petition was denied by the District Court and the Circuit Court. But, the Supreme Court accepted the case and reversed. The Supreme Court held that the State Court should have held a hearing before admitting the confession and remanded the case to the District Court with instructions to send the case back to the State Court for a proper hearing. *Jackson v. Denno*, supra, 378 U.S. at 396. Likewise here, the relief Mr. Raley seeks is the holding of a proper hearing in the State Court according to federal

law. The Sixth Circuit procedurally was correct in sending this matter back to the State Court for a new hearing according to federal law. The Court of Appeals did not order the Federal District Court to hold a hearing to decide whether the plea was voluntary. If it did, then and only then would the issue be "the proper burden on habeas corpus." This matter should be sent back to hold a proper hearing in the State Court and the Court should be directed to presume that Mr. Raley's prior guilty pleas are constitutionally invalid because of the silent record, and that the burden should be placed upon the State to prove the constitutional validity of the pleas.

This Court has held innumerable times that the burden of proving the waiver of a constitutional right is always on the State. See *Bumper v. North Carolina*, 391 U.S. 436 (1966) (burden of state to establish waiver (consent) of Fourth Amendment rights); *Miranda v. Arizona*, 384 U.S. 436 (1966) (burden on state to show waiver of privilege against self-incrimination and counsel); *United States v. Wade*, 388 U.S. 218 (1967) (burden on state to show waiver of counsel at line-up). And, of course, with trial rights the burden is even heavier. See *Patton v. United States*, 218 U.S. 276 (1930) (waiver of jury trial); *Faretta v. California*, 422 U.S. 806 (1975) (waiver of trial counsel); *Boykin*.

The Commonwealth of Kentucky and the United States Amicus Brief discuss the traditional principal of finality of judgments and the presumption of regularity. Their briefs argue that the Sixth Circuit's decision is contrary to the principle of finality of judgments and the "presumption of regularity". This contention is distracting from the issue at hand and is inaccurate. The Sixth

Circuit did not fail to consider the "presumption of regularity" and the "principal of finality" as its decision was based upon *Boykin*, supra, which is based upon *Johnson v. Zerbst*, supra, which is the same case cited by both the United States and the Petitioner as the basis for these two arguments. The due process problems of presuming a waiver of constitutional rights from a silent record far outweigh the principle of "finality of judgment" and the "presumption of regularity", as these principles are not based upon constitutional rights.

IV

THE PETITIONERS RELIANCE ON *LOPER V. BETO*, 405 U.S. 364 FOR THE PROPOSITION THAT THE DEFENDANT SHOULD HAVE THE BURDEN OF PROOF IS MISPLACED

The Petitioner and the United States argue that because prior convictions offered for enhancement purposes will in many instances be from another era; from other states; and the remoteness of prior convictions may present insuperable obstacles to the prosecution successfully defending even non-meritorious collateral attacks, that, therefore, the burden of proving the invalidity of prior convictions must be on the defendant. As a basis for this argument both the Petitioner and the United States cite the dissents in *Loper v. Beto*, supra. *Loper* was correctly decided by the majority, but its practical effect was a difficult conclusion and, thus, the dissenting opinions were strong.

Mr. Loper was tried and convicted of rape in 1947. During the trial in 1947, the prosecution introduced prior convictions to impeach Mr. Loper's credibility. The four prior felony convictions took place in 1931-1940. Twenty-

two years after Mr. Loper was convicted he filed a habeas petition in Federal Court alleging that the previous conviction was constitutionally invalid under *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), because he had been denied the assistance of counsel when convicted of the prior felonies between 1931-1940. The majority led by Mr. Justice Stewart agreed with Mr. Loper and set aside the judgment and remanded the case to the Court of Appeals for further proceedings. Mr. Justice White concurred in the result, but would have preferred to have found that the introduction of the convictions into evidence was harmless error.

Chief Justice Burger, Justice Powell, Justice Blackmun, and Justice Rehnquist dissented. Their dissents are primarily based upon the practicality of the case and not, apparently, with the rules of law established by *Gideon* and *Burgett*. Chief Justice Burger and Justice Powell stated, "When we held that *Gideon* is retroactive we meant that *Gideon* applies to an uncounseled felony conviction obtained in the past and renders that conviction invalid for *future purposes*." (Emphasis ours) See *Loper v. Beto*, 405 U.S. at 1023. Justices Powell and Burger objected to the broad enlargement effect the plurality gave to the doctrine of retroactivity, but did not wish to overrule *Gideon* or *Burgett*. Justice Rehnquist dissents also, but he concluded that the necessary predicate for the plurality constitutional decision was absent. See *Loper*, supra, 405 U.S. at 1029. Justice Rehnquist does not retreat from the decision of *Gideon* or *Burgett*, and upholds the concept that when there is a silent record there is a presumption against waiver of a fundamental constitutional right. Justice Rehnquist references *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 804, 8 L.Ed. 2d 70 (1962).

The Petitioner's reliance on *Loper* for the proposition of placing the burden of proof on the defendant to prove the constitutional invalidity of prior conviction, is misplaced. *Loper* is specific to its unusual facts, and is a unique holding that should not be referenced to detract from the important decisions of *Gideon, Burgett,* and *Boykin.* In the case at hand, Mr. Raley contests the use of constitutionally invalid felony convictions obtained in the past that are now being used in the present to enhance his sentence. Justice Burger's and Justice Powell's dissent in Loper indicate that they believe that this was how *Gideon v. Wainwright,* supra, should be applied. It is submitted that the intent of *Gideon v. Wainwright* should be applied here.

This is the situation at hand with Mr. Raley. The State desires to use the constitutionally invalid conviction to establish an element of a present crime. The argument that because the State may have difficulty in proving the constitutional validity of a prior conviction is not a basis to erode the principles of *Boykin* and place the burden of proof on the defendant. The reverse of the Petitioner's argument is, in fact, the reason *Boykin* should be found to dictate that the State has the burden of proof in this case.

If the State has difficulty in proving the constitutional validity of prior crimes because of the passage of time, clerical errors, the unavailability of records, the inaccessibility of witnesses, or any of the other multitude of problems the State alleges they have in establishing the validity of convictions, then how can a defendant with considerably less resources and control over records be required to prove the invalidity of a conviction when the State's record is silent? Due process cannot mean that when a legislature includes as an element of a crime a

legal fact (i.e., the existence of a conviction) that the defendant shall be required to prove one iota of the case against himself. The State is given a definite advantage over the defendant and the presumption of regularity in State Judicial proceedings should not override the strong presumption against assuming a waiver of constitutionally protected rights.

This case is limited to the burden of proof of the Commonwealth of Kentucky when proving prior convictions to obtain a conviction under the Kentucky PFO statute. This fact is important because due process is violated when a presumption operates to shift to the defendant the burden of disproving an element of a defined crime. *Sandstrom v. Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358 (1970). Although a state may avoid the structure of *Winship* it may only do so by formally redefining the crime. Hence, in *Patterson v. New York*, 432 U.S. 197 (1977), the Court found that the state may require the defendant to prove an affirmative defense, but only where the defense did not constitute an element of the crime. Similarly, the state may constitutionally place a less burden on the prosecution to prove the existence of facts relevant to sentencing. See *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). However, again form is crucial. Where the relevant facts are elements of the crime, they must be proved beyond a reasonable doubt.

V

THE STANDARD OF PROOF PLACED UPON THE GOVERNMENT SHOULD BE CLEAR AND CONVINCING

If you start with the principle that a defendant who enters a guilty plea is waiving three constitutional rights

and marry that with the principle that the waiver of these constitutional rights is presumptively invalid, it follows that the State must prove the validity of the guilty plea by a high standard of proof that reflects our society's confidence, and reliability in the correctness of convictions.

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Court by unanimous vote declared:

> "The function of a standard of proof, as that concept is embodied in the due process clause and in the realm of fact finding, is to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington, Id.* at 423, 99 S.Ct. 1808, quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970).

Addington was quoted with approval by the Supreme Court in *Santosky v. Kramer*, 102 S.Ct. 1388, 455 U.S. 743, 71 L.Ed.2d 599 (1981). *Santosky v. Kramer* provides a thorough and clear review of the purpose behind the judiciary allocating different standards of proof to various proceedings and the factors to consider in assigning a standard of proof. The Court in Santosky states that, "*Addington* teaches that, in any given proceeding, the *minimum* standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interest affected, but also societal judgment about how risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 754-755. The Court in *Santosky* outlined the following examples of three common standards of proof: (1) preponderance of evidence; (2) clear and convincing; and (3) beyond a reasonable

doubt. Below are excerpts from *Santosky* discussing each of these burdens of proof.

Preponderance of Evidence

"Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." *Santosky*, 102 S.Ct. 1395.

Beyond a Reasonable Doubt

"When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.*, at 427, 99 S.Ct., at 1810, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." *Id.* at 424, 99 S.Ct., at 1808. See also In re Winship, 397 U.S., at 372, 90 S.Ct., at 1076 (Harlan, J., concurring)." *Santosky*, 102 S.Ct., 1395-96.

Clear and Convincing

"This Court has mandated an intermediate standard of proof – "clear and convincing evidence"

– when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas*, 441 U.S., at 424, 99 S.Ct., at 1808. Notwithstanding "the state's 'civil labels and good intentions,' " *id.*, at 427, 99 S.Ct. at 1810, quoting *In re Winship*, 397 U.S., at 365-366, 90 S.Ct., at 1073-1074, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U.S., at 425, 426, 99 S.Ct., at 1808, 1809. See, e.g., *Addington v. Texas, supra*, (civil commitment); *Woodby v. INS*, 385 U.S., at 285, 87 S.Ct., at 487 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L. Ed. 2d 120 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796 (1943) (denaturalization)." *Santosky v. Kramer*, 102 S.Ct. 1396.

It is submitted that in light of the individual interests that are at stake in placing a defendant behind bars and the severe deprivation the defendant will suffer by having his sentence enhanced versus the State's interest in expeditious proceedings, that the defendant is entitled to at least an intermediate standard of proof.

The Court in *Santosky* reviewed the issue before it. "The correct standard of proof in a parental right termination," according to the principles set down in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The same review is applicable here. The first factor under *Eldridge* is the private interest affected. Here the private interest affect is a severe and substantial loss of liberty.

This factor weighs heavily against use of the "preponderance" standard. The second factor under *Eldridge* to be considered, is the risk of erroneous deprivation of private interest resulting from use of a "fair preponderance" standard and the likelihood that a higher evidentiary standard would reduce that risk. See *Santosky*, 424 U.S. at 335. Because convicted felons as a group are often poor, uneducated, illiterate, unsophisticated, ignorant of the constitutional protections granted to them, and unfamiliar with complicated issues of criminal law, degrees of guilt and innocence and elements of crimes, guilty pleas by their very nature are subject to error and infirmities. Thus, *Boykin* was decided.

In conjunction with the fact that defendants as a group are at a disadvantage as stated above, the State's ability to assemble its case inevitably dwarfs the defendant's ability to mount a defense. (The State's failure to adequately preserve its own records is also the only reason why this Court must determine the issues before it today.) The State's attorney will most always be experienced in gathering his records, building his case, and the procedures followed at the hearing. Furthermore, the primary evidence at the hearing will be the State's own records. Couple this with the "fair preponderance of the evidence" standard and these factors create a significant prospect of erroneous guilty pleas. See *Santosky*, 102 S.Ct. 1400.

Most importantly, given the weight of the private interest at stake, the social costs of even occasional errors are sizeable. Illustrative of the significant social cost that directly follow the loss of faith in our judicial system is had by reviewing the backlash of the verdict in the recent "*Rodney King*" trial in the bell-weather state of California.

The public's perception of the inequities and unreliability of our judicial system costs many of our citizens their lives, hundreds of millions of dollars in property damage, and an immeasurable amount of lost hope and frustration among those members of our society most directly affected by our criminal justice system, (i.e., the poor, uneducated, illiterate members of minorities living in our urban cities).

Imposing an intermediate standard of proof would have both a practical and symbolic consequence. *Addington v. Texas*, 441 U.S. at 425, 99 S.Ct. at 1809; *Santosky v. Kramer*, 102 S.Ct. 1400, 455 U.S. 763. Dictating an intermediate standard of proof is one way to impress upon the fact-finder the importance of the decision he is making.

But, before a decision regarding standard of proof is made, the State's interest must then be considered. *Eldridge*, supra. The State's interest must be properly weighed against the individual's interest. The State's interest in this regard is to protect its fiscal and administrative costs, to preserve the concept of finality of convictions, and to uphold the presumption of regularity in court proceedings. All of these interests are important and valid interests that allow our judicial systems to function at a time when they are overworked, underfunded. But, in an age of technology and computerization, where even the poorest of our society have "VCR's" and "Walkmans" the State can easily afford the cost of recording and preserving a plea. Furthermore, the cost and expense of recording and preserving a plea is minuscule compared to the cost of housing one erroneously convicted felon for 5 to 15 years, let alone the cost associated with loss of faith in our judicial system by

society. The concepts of finality and regularity are also not significantly eroded if a state properly preserves its records and follows the simple and straight forward rules of *Boykin* that justify a presumption of regularity and the concept of finality. Without adhering to these simple procedural tasks the State is not entitled to a presumption of regularity of its proceedings and/or to the principle of finality.

An example of the ease and fiscal reasonableness of following the Supreme Court's decision in *Boykin* may be had by a look at the actions of the District Courts in Jefferson County, Kentucky. The District Court in Jefferson County uses a simple "Boykin Sheet" in every DUI case where a guilty plea is entered, see Addendum. This "Boykin Sheet" is reviewed on the record by the Court, signed by the Judge, the defendant, and defense counsel. The sheet is then placed in the case jacket for preservation. An audio recording is also made and the Court Administrator is responsible for the storage and preservation of these audio tapes. The tapes are then stored by date. These simple procedures ensure that all defendants who plead guilty to DUI in Jefferson District Court have their pleas properly taken according to *Boykin* and that their pleas are preserved. The cost of these functions are not taxing fiscally or administratively.

It is submitted that weighing the different competing interests of the State and the individual as set forth in *Eldridge* and examining the constitutional rights that are at stake by presuming a waiver where the record is silent, that the standard of proof should be "clear and convincing."

VI

THE STATE SHOULD NOT BE ALLOWED TO MEET ITS BURDEN OF PROOF BY THE USE OF A PRESUMPTION

The Sixth Circuit decision in *Dunn v. Simmons*, 877 F.2d 1275 at 1278 (6th Circuit 1989), succinctly sets forth why the use of a "presumption of regularity" circumvents the ruling in *Boykin* by ostensibly only using the presumption to satisfy a burden of production. Under the procedure proposed by the Commonwealth, the State retains the burden of persuasion on the ultimate question of intelligent and voluntary waiver. But, once the state establishes the plain record of conviction, the burden of producing evidence shifts to the defendant to show an irregularity in the plea procedure since that unadorned record, bolstered by the presumption, is held by the State to be sufficient to establish a *prima facie* case that the guilty plea was validly accepted. The defendant is permitted to "refute" this presumption, presumably by evidence that would be sufficient to support a finding that the plea proceedings were inadequate.

Although the State's procedure ostensibly permits the use of the presumption only to satisfy a burden of production, in reality it may be utilized by the State to carry its ultimate burden of persuasion. That is because, if the defendant offers no rebuttal, the State will prevail; the presumption becomes a substitute for evidence supplementing the conviction record. The practical effect of the State's procedure, then, is to allow the State to prevail by carrying its burden of persuasion upon the bare record of the fact that a conviction was entered against the defendant. This result ignores the Supreme Court's

admonition in *Boykin* against presuming a waiver from a silent record.

The review of this issue by the Sixth Circuit in *Dunn*, supra, is the only logical conclusion that can be reached and should be accepted by this Court.

VII

THE STATE IS WRONG TO *PRESUME* THAT RALEY WAS AWARE OF HIS RIGHTS IN THE 1981 PROCEEDING BECAUSE OF HIS EXPERIENCE WITH THE COURTS IN 1979

"Presuming" a basic understanding of trial rights from the defendant's single, prior experience with the law is dubious at best. Also, as a factual matter, such a presumption is unsound. Psychologists generally recognize that long term memory (defined as memory removed from an event by more than a few seconds) is fleeting and indefinite. Stephen K. Reed, *Cognition*, Anderson Publishing (2d ed. 1988) at page 82, and see generally, John Best, *Cognitive Psychology*, St. Paul, Minnesota (1986). Certain events, like the death of a loved one or the death of a President, will be indelibly etched on one's memory for a lifetime. More often, however, memory of events fade and become only vague recollections. Common to most law students, for example, is the experience of studying material for hours and hours before an exam, only to lose command of the specific subject within a few weeks (or even days).

Prior experience with the legal system, of course, might have evidentiary value, and might even allow one to draw an inference that the defendant understood his rights. Such an inference, however, must be cast as only a permissive one, see *County Court of Ulster County v. Allen*,

442 U.S. 140 (1979), and cannot be made controlling. In any event, given the lack of expert evidence dealing with long term memory, the Court should not now attempt to forge a presumption that a person once exposed to the legal system forever remembers his rights. It is not probable that such is the case, and indeed, appears very improbable. The issue should be left to the lower courts in the first instance to decide whether as an evidentiary matter such an inference is persuasive.

CONCLUSION

The Sixth Circuit's opinion should be affirmed.

Respectfully submitted,

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No._____

JEFFERSON DISTRICT COURT

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

GUILTY PLEA

_____

DEFENDANT

* * * * * * * * * * * * * * * * *

1. Do you understand the charges against you and wish to plead guilty?
   _____YES _____NO
2. Do you know that you have the right to jury trial and if you plead guilty you give up that right?
   _____YES _____NO
3. Do you know that you have the right to remain silent and not plead guilty but if you do plead guilty you give up these rights?
   _____YES _____NO
4. Do you know you have the right to question witnesses against you and call witnesses on your behalf?
   _____YES _____NO
5. Are you under the influence of any alcohol, drugs or narcotics?
   _____YES _____NO
6. Have you been or are now being treated for a mental illness?
   _____YES _____NO
7. Has anyone threatened or coerced you to plead guilty or promised you anything to make you plead guilty?
   _____YES _____NO
8. Are you pleading guilty voluntarily and of your own free will?
   _____YES _____NO
9. Are you admitting to this Court that you drove while under the influence of alcohol?
   _____YES _____NO

* * * * * * * * * * * * * * * * *

10. Do you know you have the right to counsel and are you freely waiving that right?
    _____YES _____NO
11. Do you understand that you must attend and complete an Alcohol Education Program?
    _____YES _____NO

_____ Defendant

_____ Attorney for Defendant

_____ Judge

Date_____

APPENDIX

NO. 91-719

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN, PETITIONER

versus

RICKEY HAROLD RALEY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Comes the Attorney General of the Commonwealth of Kentucky as counsel for petitioner Al C. Parke, Warden, and states in reply to the Brief for Respondent as follows:

ARGUMENT I

THE ARGUMENT THAT BOYKIN DID NOT ESTABLISH A GROUND FOR COLLATERAL ATTACK UPON A CONVICTION SHOULD BE CONSIDERED BY THIS COURT.

The Respondent (Raley) contends that the Petitioner (Commonwealth) did not adequately present the argument that Boykin v. Alabama, 395 U.S. 238 (1969), did not establish a ground for collateral attack in the lower federal courts. (Brief for Respondent, pp. 7-9). The Commonwealth disagrees.

The issue whether Boykin itself provides a ground to invalidate a prior conviction on collateral review (including a sentence enhancement proceeding) is inherent in the question presented, i.e., which party bears the burden of proof regarding validity of such convictions. The application of Boykin to a

collateral attack is the threshold issue on the question regarding burden of proof. That issue is also inherent to Arguments II to VII advanced by Raley. (Brief for Respondent, pp. 9-30). The Federal District Court obviously agreed with the Commonwealth that mere failure to conduct a Boykin colloquy did not itself establish ground for collateral relief since that Court denied Raley's habeas petition without finding that Boykin was complied with. (AP 22-25; HR 8).

The Commonwealth's Memorandum of Law filed in the Federal District Court, which presented the Commonwealth's argument regarding the petition for habeas corpus, argued that Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990), was wrongly decided. (Memorandum of Law in support of respondent's answer [Memo], p. 11; HR 3). In the United States Court of Appeals for the Sixth Circuit, the Commonwealth requested an en banc hearing to argue that Dunn v. Simmons, supra, should be overruled and specifically argued that

"Dunn was wrongly decided". (Raley v. Parke, 945 F.2d 137 at 141 (6th Cir. 1991) (AP 11 and 13). The Commonwealth's three argument captions in its brief in the Sixth Circuit stated:

> I. The Sixth Circuit Opinion in Dunn v. Simmons is contrary to precedents of the United States Supreme Court and other circuits of the United States Court of Appeals and should be overruled.
>
> II. The Kentucky Trial Court and Federal District Court correctly concluded that Raley's 1981 guilty plea was voluntary.
>
> III. The United States District Court correctly rejected Raley's claimed errors.

(Brief for Respondent-Appellee, pp. 8, 19, and 29).

The cases cited by the Commonwealth in its brief in the Sixth Circuit do not establish that mere violation of Boykin is a ground for a collateral attack and note the distinction between direct review and collateral review. The Sixth Circuit's own opinions in similar cases did not conclude that Boykin error is automatic ground to invalidate a guilty plea on

collateral attack. See Riggins v. McMackin, 935 F.2d 790 at 795-796 (6th Cir. 1991) [collecting cases]; Pitts v. United States, 763 F.2d 197 at 200 (6th Cir. 1985) [cited in Sixth Brief at p. 25]; Roddy v. Black, 516 F.2d 1380 at 1383-1385 (6th Cir.), cert. denied, 423 U.S. 917 (1975) [cited in Sixth Circuit Brief at p. 24].

Since the Commonwealth did not claim in the Federal District Court that the colloquy required by Boykin v. Alabama was in fact conducted regarding the 1981 guilty plea, the Federal District Court obviously accepted the principle that the mere failure to conduct such a colloquy did not automatically require a conviction to be invalidated. Hence that aspect of this case was clearly before the Sixth Circuit for its consideration. The relevancy of that argument is also demonstrated by the Brief of the United States as amicus curiae (pp. 16-23) in this Court.

This Court has recently pointed out that the certiorari petitioner and respondent "are not

limited to the precise arguments they made [in the Court] below." Yee v. City of Escondido, 112 S.Ct. 1522 at 1532, 118 L.Ed.2d 153 at 169-170 (April 1, 1992). The Court has discretion in deciding the manner in which an argument must be preserved in a lower federal court for review by this Court. See United States v. Williams, 112 S.Ct. 1735 at 1738-1741, 118 L.Ed.2d 352 at 361-364 (May 4, 1992). As in the Williams case, the Commonwealth (certiorari petitioner) did not concede this matter in the lower federal courts. This argument does not "sandbag" the Sixth Circuit.

For the foregoing reasons, the Court should consider the argument as to whether Boykin permits a prior conviction offered for sentencing enhancement to be collaterally attacked.

ARGUMENT II

JACKSON V. DENNO, 378 U.S. 368 (1964), DOES NOT REQUIRE THAT PRIOR CONVICTIONS OFFERED FOR SENTENCING ENHANCEMENT BE REVIEWED BY HABEAS CORPUS PROCEEDINGS.

Raley has cited Jackson v. Denno, 378 U.S. 368 (1964) (Brief for Respondent, p. 16), for the principle that a federal habeas court may order a state court to conduct a hearing according to federal constitutional standards. The Court in Jackson held that the habeas petitioner was entitled to hearing by the trial court upon the voluntariness of his confession outside the presence of the jury and that the hearing and further proceedings "should occur initially in the state courts rather than in the federal habeas court." 378 U.S. at 391 and 393. In this case Raley did not testify or assert in his habeas petition that his guilty plea was coerced. (JA 82 and 84; HR #2; TE 20, JA 51; Raley v. Parke, 945 F.2d 137 at 139-140, AP 5-6 and 10) See Colorado v. Connelly, 479 U.S. 157 at 164-167 (1986), defining coercion

regarding confessions. Raley in fact received an evidentiary hearing in state court outside of the jury's presence, the type required by Jackson.

Subsequently, the Court has restricted Jackson. In McMann v. Richardson, 397 U.S. 759 at 773 (1970), the Court ruled that Jackson did establish grounds to automatically invalidate a guilty plea simply because a possibly inadmissible confession might have been introduced if a trial had been requested by the defendants. In Wainwright v. Sykes, 433 U.S. 72 at 86-87 (1977), the Court ruled the Jackson did not prevent a claim regarding the voluntariness of a confession from being defaulted in state court.

In Stone v. Powell, 428 U.S. 465 (1976), the Court held that Fourth Amendment claims could not be relitigated in federal habeas proceedings after a full and fair hearing in state court, even though previously in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court had

reviewed the voluntariness of consent for a police search under the federal habeas corpus statute. See 428 U.S. at 481 and 491, n. 31. Also see Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 118 L.Ed.2d 318 (May 4, 1992) [right of habeas petitioner to present new evidence to federal habeas court regarding the validity of a guilty plea limited]. More recently, the Court has granted review regarding the extent to which the admissibility of a confession is open to examination under the habeas statute. Withrow v. Williams, cert. granted, 112 S.Ct. 1664, 118 L.Ed.2d 386, 51 Crim.L.Rep. 3021 (April 20, 1992; No. 91-1030); opinion below, 944 F.2d 284 (6th Cir. 1991).

The Eleventh Circuit has apparently concluded that collateral review of a conviction offered solely for sentencing on a subsequent offense is not constitutionally required. United States v. Williams, 954 F.2d 668 at 673 (11th Cir. 1992). Also see United States v. Hewitt, 942 F.2d 1270 at 1276 (8th Cir. 1991),

and United States v. Day, 949 F.2d 973 at 980 (8th Cir. 1991) [collateral attack on prior conviction offered for sentencing under U.S. Sentencing Guidelines no longer authorized]; United States v. Canales, 1992 U.S.App.Lexis 9591, 51 Crim.L.Rep. 1218 (5th Cir.) (May 7, 1992) [such review is now discretionary]; United States v. French, 51 Crim.L.Rep. 1241 (6th Cir.) (May 28, 1992) [same].

The fact that previous cases have assumed by consent of the parties that a particular issue was reviewable on collateral attack does not mean that such review is constitutionally required. See Duckworth v. Eagan, 492 U.S. 195 at 205-214 (1989) (O'Connor, J., concurring); Stone v. Powell, 428 U.S. at 480-482; Wainwright v. Sykes, 433 U.S. at 84-88. Indeed, the Jackson opinion itself does not indicate that the state court's determination after the new hearing would be subject to further federal habeas court review. "[I]f the state court, at an evidentiary hearing, redetermines the facts

and decides Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession being admitted in evidence." [Emphasis added.]

Moreover, as the Commonwealth has previously argued (Brief for Petitioner, pp. 8-18), the mere fact a plea was made without a Boykin warning does not establish that the plea was involuntary. The Court has previously held that confessions made without a Miranda warning are not necessarily involuntary and are not devoid of probative value. See Michigan v. Harvey, 494 U.S. 344 at 350-352 (1990). Hence Boykin error should not automatically invalid a guilty plea as involuntary. (See Brief for Petitioner, pp. 12-18).

For the foregoing reasons, Jackson v. Denno does not require that Raley receive a second evidentiary hearing in state court.

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

AL C. PARKE, WARDEN, PETITIONER

v.

RICKY HAROLD RALEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether due process requires the prosecution to prove the validity of prior convictions that are used for sentence enhancement, when the prior convictions resulted from guilty pleas that the defendant claims were invalid under *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-719

AL C. PARKE, WARDEN, PETITIONER

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RICKY HAROLD RALEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper resolution of the question presented in this case. Several federal statutes enhance a defendant's sentence based on prior convictions, including the Armed Career Criminal Act, 18 U.S.C. 924(e), and provisions of the Controlled Substances Act, 21 U.S.C. 841(b), 842(c), 843(c), and 844(a). In addition, a defendant's sentencing range under the federal Sentencing Guidelines depends in significant part on the

defendant's criminal history, which is determined mainly by reference to the defendant's prior convictions. See Sentencing Guidelines § 4A1.1. Defendants facing enhanced punishment under the statutes or the Guidelines frequently seek to challenge the validity of their prior convictions. When the prior convictions rest on guilty pleas, defendants often claim that the guilty pleas were invalid because they were not entered in compliance with *Boykin* v. *Alabama*, 395 U.S. 238 (1969). The questions whether such a claim is cognizable in a sentence enhancement proceeding, and, if so, which party bears the burden of proof on the issue are important to the administration of the federal sentencing enhancement provisions, particularly in cases in which the prior convictions are old and the transcripts of the plea proceedings have been lost or are otherwise unavailable.

STATEMENT

After entering a guilty plea in Kentucky state court on May 28, 1987, respondent was convicted of second-degree robbery and of being a persistent felony offender (PFO) in the first degree. A PFO offense is charged and proved separately from the underlying crime. The effect of a conviction on the PFO charge is to increase the minimum and maximum punishments for the predicate offense. Ky. Rev. Stat. § 532.080 (Michie/Bobbs-Merrill 1990). A first-degree PFO offense requires proof of two prior qualifying convictions, and a second-degree PFO offense requires proof of one such conviction. Respondent was found guilty of first-degree PFO based on two prior convictions. He was sentenced to five years in prison for the robbery, which was enhanced to ten years based on his PFO status. 5/28/87 Plea Tr. 11.

1. In seeking a penalty enhancement under the PFO statute, the Commonwealth introduced a January 3, 1980, conviction for third-degree burglary (to which respondent had pleaded guilty in 1979), and an October 8, 1981, conviction for third-degree burglary (to which respondent had pleaded guilty earlier that year). Respondent contended that both prior convictions were invalid under this Court's decision in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), which reversed a guilty plea conviction because the record did not affirmatively show that the defendant's plea was voluntary and intelligent. Because transcripts of the 1979 and 1981 guilty plea proceedings were unavailable, and because respondent could not recall having been advised of his constitutional rights, respondent claimed that both convictions were invalid under *Boykin* and could not be used as a basis for sentence enhancement. 5/28/87 Tr. 3-5, 54-57.

At a hearing on respondent's motion to prevent the use of the two prior convictions, respondent testified that when he entered the first guilty plea in 1979, he was 23 years old and had never before been charged with a felony, although he had been arrested and fined several times on misdemeanor charges. 5/28/87 Tr. 7-9. Respondent was represented by appointed counsel in the 1979 case, *id.* at 9, and by retained counsel in the 1981 case, *id.* at 16. Respondent recalled that in 1979 the judge had asked him if his decision was induced by threats or promises or made under the influence of intoxicants or medication. *Id.* at 12-13. With respect to the 1981 case, respondent recalled that the judge also had questioned him to ensure that his plea was voluntary and had

informed him that he had a right to a jury trial. *Id.* at 19-20. Respondent did not recall any other warnings about constitutional rights in either case.

According to respondent, in 1979 and 1981 he was unaware that the prosecution had the burden of proving the offense, or that he had the right to remain silent and to confront the witnesses against him. 5/28/87 Tr. 20-22. Respondent conceded, however, that the judges in both cases might have said more than he recalled and that they might have advised him of his constitutional rights. *Id.* at 33-35, 41-42.

At the conclusion of respondent's testimony, the Commonwealth called Thom Marshall, the lawyer who had represented respondent in the 1979 case. Marshall did not specifically remember respondent, but he authenticated an official form that respondent had signed at the time of the 1979 plea. 5/28/87 Tr. 43-46. The signed form stated:

> I understand that I may, if I so choose, plead "Not Guilty" to any offense charged against me, and that if I should choose to plead "Not Guilty" the Constitution guarantees me (a) the right to a speedy and public trial by jury, (b) the right to see and hear all witnesses called to testify against me, (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witness in my favor, and (d) the right to have the assistance of counsel for my defense at all stages of the proceedings.

11/29/79 Plea of Guilty ¶ 11. Marshall verified his signature on a 1979 form certifying that, among other things, he had explained respondent's constitutional rights to him. 5/28/87 Tr. 45-46.

After the hearing, the state trial court denied respondent's motion to exclude the two prior convictions,

finding that respondent "intelligently pled guilty in both of those prior instances, with full knowledge of the nature and consequences of a plea of guilty." 5/28/87 Tr. 60. Respondent's plea of guilty reserved the right to challenge the court's denial of his motion to exclude the two convictions.

2. The Kentucky Court of Appeals affirmed. Pet. App. A26-A33. The court rejected respondent's claim that the trial court erred in assigning him the burden of producing evidence that his prior convictions were invalid. *Id.* at A27. Rather, the court explained, after the Commonwealth proves the fact of the prior convictions, there is a "presumption of regularity" that the defendant must overcome by showing some infringement of his rights or some irregularity in the proceedings that led to the prior conviction. *Id.* at A28 (citing *Dunn* v. *Commonwealth*, 703 S.W.2d 874, 876 (Ky. 1985), cert. denied, 479 U.S. 832 (1986)). If the defendant introduces sufficient evidence to refute the presumption of regularity, the burden shifts to the Commonwealth to prove that the judgments were entered in a manner that protected the defendant's rights. Pet. App. A28.

The court held that the trial court did not commit clear error in finding that the 1979 and 1981 guilty pleas were valid. Pet. App. A30-A33. With respect to the 1979 guilty plea, the court found that there was sufficient evidence "to support [the] finding that [respondent] was made aware of his alternatives to pleading guilty, and that his 1979 guilty plea satisfied the dictates of *Boykin* v. *Alabama*." *Id.* at A31-A32. Although respondent did not specifically recall having been advised of his rights, the court observed that respondent had signed a waiver of his rights and that his attorney had explained those rights to him. *Id.* at A32. With respect to respondent's 1981 guilty

plea, the court noted that because respondent was advised of his rights in 1979, the court could infer "that he was still aware of his rights two years later in 1981." *Ibid.* In addition, the court found that respondent's "testimony indicate[d] that his knowledge and sophistication regarding his rights under our judicial system increased substantially after his first conviction." *Ibid.*

3. After the Kentucky Supreme Court denied review, respondent petitioned for a writ of habeas corpus from the United States District Court for the Western District of Kentucky. The district court denied the writ. Pet. App. A22-A25. The court explained that "the record plainly reflects that at the time of his guilty plea in late 1979, [respondent] was fully advised of his constitutional rights, and signed a paper admitting that he had been so advised." *Id.* at A25. The court reasoned that respondent's "understanding of those rights cannot be assumed to have evaported in the period of less than two years between that conviction and his 1981 conviction." *Ibid.* Accordingly, the court found "no basis for the claim that the guilty pleas to the predicate offenses were not knowingly and voluntarily entered." *Ibid.*

4. The court of appeals reversed. Pet. App. A3-A20. The court interpreted *Boykin* to mean that even with respect to a guilty plea conviction that is being used for enhancement purposes, the Constitution requires the prosecution to bear the burden of showing by clear and convincing evidence that the defendant in the prior guilty plea proceedings "knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to remain silent." *Id.* at A10. In view of the 1979 "Plea of Guilty" form and re-

spondent's admission that he signed that form, the court concluded that the Commonwealth had satisfied its burden as to the 1979 guilty plea. *Id.* at A14-A15. With respect to the 1981 guilty plea, however, the court concluded that respondent's waiver of his rights in 1979 did not establish that he had validly waived his rights in 1981. *Id.* at A15-A18. The court therefore ordered the district court to grant a writ of habeas corpus unless the Commonwealth could affirmatively show that the 1981 guilty plea was voluntary and intelligent. *Id.* at A20.

SUMMARY OF ARGUMENT

I. Statutes that enhance criminal penalties on the basis of prior convictions are commonplace. Because the enhanced sentences for defendants with prior convictions can be substantial, defendants have a great incentive to challenge the use of their prior convictions in enhancement proceedings. This Court has held that a defendant may challenge the use of a prior conviction for enhancement purposes, but the Court has permitted such challenges only where the conviction is infected by an error of the most fundamental sort: the complete denial of the right to counsel. The Court has never permitted a defendant in a sentence enhancement case to challenge a prior conviction based on an alleged flaw in the guilty plea proceeding that led to the conviction. And it has never suggested that the Due Process Clause requires the State to bear the burden of proving that the guilty plea proceeding was valid before the State can use the conviction for enhancement purposes.

A. If the Due Process Clause is to bar the use of a prior conviction for enhancement purposes, the defendant should have to show that the prior convic-

tion was fundamentally flawed because of an error equivalent to the complete denial of counsel. A legislature enjoys substantial freedom to define criminal offenses and prescribe punishments, as long as the scheme it adopts is rational. Thus, a legislature could insist that prior convictions be excluded from consideration for enhancement unless they are found to be wholly free from error. On the other hand, a legislature should be free to permit the use of prior convictions without regard to possible errors in the proceedings leading to those convictions, unless the errors are so grave that the resulting convictions necessarily lack reliability. Only with respect to a conviction of that sort is it irrational to impose a more severe sentence on a defendant based on a prior conviction.

There are powerful policy reasons to permit the use of prior convictions for enhancement purposes regardless of claims of procedural error in the prior proceedings. Challenges to prior convictions are, by definition, collateral attacks on final judgments. The interests in the finality of the prior judgments are similar to but even stronger than in the case of collateral attacks on convictions through habeas corpus. Moreover, a constitutional rule requiring courts to recognize a broad range of challenges to prior convictions would largely undermine the effectiveness of sentence enhancement statutes. Prior convictions frequently involve closed cases, and often come from other jurisdictions. While basic information about the convictions ordinarily can be found, record material such as transcripts and pleadings are often unavailable, either because the materials have been lost or because, for example, an appeal was never taken and the pertinent court sessions were therefore never transcribed.

B. The prohibition against challenges to prior convictions that are used for enhancement should be particularly strict in the case of convictions resulting from guilty pleas. A represented defendant's decision to plead guilty provides a substantial guarantee that the conviction is factually reliable. A plea of guilty is a judicial admission of guilt and for that reason is a sufficiently reliable indicator of guilt that it would be rational for a State to base sentence enhancements on such admissions alone. Thus, in a case such as this one, where the record shows that the defendant was represented by counsel and pleaded guilty in the prior case, the conviction should be deemed sufficiently reliable to permit its use for sentence enhancement even if the conviction would have been subject to challenge on direct review because of some error in the guilty plea proceeding.

A defendant should not be allowed to disable the State from using his prior conviction for enhancement purposes by claiming that he was not given a complete advisement of his rights at the time he pleaded guilty in the earlier case. The requirement that a defendant be advised of his rights before pleading guilty is a prophylactic rule designed to ensure that the defendant's plea is voluntary and knowing. The omission of an advisement of rights is not a constitutional error, much less a fundamental flaw that so undermines the reliability of a prior conviction that it violates due process for a court to rely on that conviction for enhancement purposes in a later case.

II. Although we do not believe it is constitutionally required, the Kentucky courts permit a defendant in a sentence enhancement proceeding to challenge the use of his prior conviction on the ground that he was not adequately advised of the rights he

was waiving at the time he entered his guilty plea in that case. Respondent's only quarrel with the procedure employed by the Kentucky courts in his case was that it imposed on him the burden to show that he was not given the appropriate advice of rights at the time of his guilty plea. The Kentucky courts' allocation of the burden of proof is not error. This Court has long recognized that a presumption of correctness attaches to a final conviction of a represented defendant. In light of that presumption, the Due Process Clause cannot be interpreted to impose on the State the burden to show that the defendant was specifically advised of his rights before he entered his plea. The Kentucky courts' procedure that allocated the burden on that issue to respondent was therefore constitutional, and the Sixth Circuit's ruling to the contrary was wrong.

ARGUMENT

I. A GUILTY PLEA CONVICTION IS PRESUMPTIVELY VALID AND MAY BE USED FOR ENHANCEMENT PURPOSES WITHOUT PROOF THAT THE GUILTY PLEA WAS VOLUNTARY AND INTELLIGENT

A. Prior Convictions May Be Used For Enhancement of Punishment Absent A Fundamental Constitutional Infirmity That Makes Them Inherently Unreliable

One of the most familiar features of criminal sentencing is that recidivists are typically sentenced more severely than first-time offenders. That principle has been formalized in recidivist statutes and other sentence enhancement schemes that "have been enacted in all the States and by the Federal Government." *Spencer* v. *Texas*, 385 U.S. 554, 559 (1967) (footnotes omitted). The constitutionality of those

statutes, and of the general principle of imposing more severe punishment upon repeat offenders, "is no longer open to serious challenge." *Oyler* v. *Boles*, 368 U.S. 448, 450 (1962).[1]

Although the States and the federal government are largely free to define the types of convictions that may be used for sentence enhancement, the Court has imposed some limits on that freedom. In particular, the Court has held that an uncounseled felony conviction may not be used for enhancement purposes, *Burgett* v. *Texas*, 389 U.S. 109 (1967), just as such a conviction may not be relied on generally in sentencing, *United States* v. *Tucker*, 404 U.S. 443 (1972), or be used to impeach the credibility of the defendant at the guilt phase of a criminal trial, *Loper* v. *Beto*, 405 U.S. 473 (1972).

The subsequent conviction or sentence in each of those cases "depended upon the reliability of a past uncounseled conviction." *Lewis* v. *United States*, 445 U.S. 55, 67 (1980). Yet the denial of counsel in a felony case implicates "the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); accord *Mackey* v. *United States*, 401 U.S. 667, 693-694 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part). As the Court has explained, because "a layman, no matter how intelligent, could not possibly further his claims of innocence and violation of previously declared

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[1] Such statutes * * * have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967).

rights," an uncounseled conviction "lack[s] reliability." *Linkletter* v. *Walker*, 381 U.S. at 639 n.20. The right to counsel has been regarded as so fundamental to the integrity of a conviction that the Court has accorded fully retroactive effect to *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which initially recognized the right of indigent defendants to receive appointed counsel in felony prosecutions. See, *e.g.*, *Kitchens* v. *Smith*, 401 U.S. 847 (1971); *McConnell* v. *Rhay*, 393 U.S. 2, 3 (1968); *Pickelsimer* v. *Wainwright*, 375 U.S. 2, 3 (1963).[2]

The Court has never identified any other error as sufficiently grave to disqualify a prior conviction from being considered in a sentence enhancement proceeding. We submit, however, that by analogy to the denial of counsel, a defendant should be permitted to challenge prior convictions when he can point to fundamental errors relating to the "basis protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or

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[2] To be sure, the Court has made clear that in some settings, a prior conviction can properly be used in a criminal case regardless of its reliability. In *Lewis* v. *United States*, 445 U.S. 55 (1980), for example, the Court upheld a conviction for possession of a firearm by a convicted felon, even though the predicate conviction was uncounseled and therefore invalid. The Court concluded that the use of the conviction did not deny the defendant due process because Congress could rationally find that "a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness." *Id.* at 67. The federal firearms statutes, the Court noted, "focus not on reliability, but on the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons." *Ibid.*

innocence." *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986).[3]

The Sixth Circuit's ruling in this case goes far beyond that narrow category of errors. In so doing, it invites the Court to create a regime in which prior convictions will be subject to close scrutiny for procedural error before they will be eligible to be used for sentence enhancement. Such a regime would undermine the traditional freedom of legislatures to define the factors to be considered at sentencing. In addition, it would be contrary to the principles of finality, and it would create serious practical difficulties in the administration of recidivist statutes. Those policies, we submit, counsel in favor of a rule permitting challenges to prior convictions only for the denial of counsel or an error equivalent to the denial of counsel in its impact on the reliability of the prior judgment.

1. It is a familiar principle of the law of sentencing that a court may consider a broad range of factors in determining the appropriate sentence, without running afoul of the Due Process Clause. See *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *United States* v. *Tucker*, 404 U.S. at 446; *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949). A corollary of that principle is that legislatures have great leeway in directing courts to consider particular factors in

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[3] In addition to the denial of counsel, the Court in *Rose* v. *Clark*, 478 U.S. at 577, cited the denial of a trial before an impartial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927), as the kind of error that "necessarily render[s] a trial fundamentally unfair." Although the *Rose* Court also suggested that introducing a coerced confession would constitute error of that magnitude, the Court subsequently made clear that introducing such evidence is not in the same class as those other errors. See *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1264-1266 (1991).

sentencing or in setting the penalties to be imposed for particular offenses and particular offender characteristics. See *Mistretta* v. *United States*, 488 U.S. 361, 364-365 (1989).

Consistent with due process, a State may permit its sentencing courts to consider a wide range of factors indicating that the defendant deserves a more severe sentence because of his criminal background. A State is not constitutionally limited to considering only error-free convictions in making such a judgment. Indeed, it is not even limited to considering convictions at all; it could, if it chose, authorize sentencing courts to consider the defendant's prior arrests or indictments, even when those events did not lead to conviction, since arrests and indictments are rational indicators of a defendant's criminal background. See *United States* v. *Cimino*, 659 F.2d 535, 538 (5th Cir. 1981); *Houle* v. *United States*, 493 F.2d 915 (5th Cir. 1974); *United States* v. *Metz*, 470 F.2d 1140, 1142 (3d Cir. 1972), cert. denied, 411 U.S. 919 (1973). Because the Kentucky legislature could have permitted enhancement of sentences for defendants with records containing indicators of criminal conduct falling short of criminal convictions, it is difficult to justify the Sixth Circuit's conclusion that because Kentucky chooses to rely on prior convictions, due process prohibits the use of those convictions if they would have been subject to procedural challenge on direct review.

2. The Sixth Circuit's decision in this case also is contrary to traditional principles of finality as applied to collateral attacks on criminal convictions. Whenever a defendant contests a final judgment of conviction in a subsequent proceeding, he confronts the principle that "a judgment can not be lightly set aside by collateral attack * * *. When collaterally

attacked, the judgment of a court carries with it a presumption of regularity." *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938); accord *United States* v. *Frady*, 456 U.S. 152, 164 (1982) (when defendant's "chance to appeal has been waived or exhausted, * * * [a court is] entitled to presume he stands fairly and finally convicted"); *Strickland* v. *Washington*, 466 U.S. 668, 697 (1986) ("the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment"). A challenge to the use of a prior final conviction for sentence enhancement is, of course, a type of collateral attack on the prior conviction. The same principles of finality are therefore applicable in that setting as in the more conventional setting of collateral attacks by way of habeas corpus. In fact, there are good reasons to give that presumption additional weight when a collateral attack occurs in the context of sentence enhancement.

Prior convictions offered for enhancement purposes will in many instances be from "another era from other States." *Loper* v. *Beto*, 405 U.S. at 500 (Rehnquist, J., dissenting). The remoteness of the prior convictions may present insuperable obstacles to the prosecutor's successfully defending against even nonmeritorious collateral attacks. "The States that rendered the convictions [will not be] parties to the [subsequent] * * * proceeding, and, of course, have no interest whatever in sustaining the validity of sentences long since served." *Ibid.* Moreover, the court and counsel in the subsequent proceeding "cannot be expected to have any familiarity with the vagaries of criminal procedure" in the original rendering States. *Ibid.* The prior convictions may be decades old, and any surviving witnesses may well be "sufficiently distant from the location of the [later proceedings] as to

render their voluntary appearance unlikely, and their compulsion by process impossible." *Ibid.* Moreover, because the defendant may not have considered it worth taking an appeal from the judgment against him, he may never have ordered a transcript of the proceedings leading to the prior conviction, and for that reason the record of the prior case may be difficult or impossible to reconstruct. In such instances, a rule permitting a variety of challenges to a prior conviction, and imposing on the State the burden to demonstrate the validity of that conviction, would have the incongruous effect of making the least contested convictions the ones that would be hardest for the State to qualify for use in sentence enhancement proceedings.[4]

B. The Absence Of Any Record Of A Plea Proceeding Does Not Render A Prior Final Conviction Fundamentally Unfair Or Unreliable

1. *Counseled Guilty Pleas Are Subject To Only Limited Challenge on Collateral Attack*

When a guilty plea is at issue, "the concern with finality * * * has special force." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). As the Court has explained, "inroads on the principle of finality

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[4] While placing the burden of proof on the defendant to show the invalidity of a predicate conviction provides some degree of protection from abusive and burdensome collateral attacks, that safeguard is not sufficient. As this case illustrates, if a broad array of errors is cognizable in a sentence enhancement proceeding, it may be much easier for a defendant to establish a prima facie case of error (by simply testifying to the omission of some procedural requirement) than for the government to find evidence to rebut it.

tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. *Addonizio* v. *United States*, 442 U.S. 178, 184-185 n.11 (1979). The impact is greatest "when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas [and because] the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *United States* v. *Timmreck*, 441 U.S. at 784 (citation omitted). Accord *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985).

When a guilty plea is entered by a defendant who is represented by counsel, the practical concerns favoring finality are strongly reinforced by the high degree of reliability associated with a counseled guilty plea. "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (emphasis omitted). Subject to narrow exceptions that are unrelated to factual guilt or innocence,[5] "a voluntary and intelligent plea

[5] This Court has permitted a collateral attack upon a guilty plea when the defendant pleaded guilty to a charge that, on its face, was barred by the Double Jeopardy Clause. See *United States* v. *Broce*, 488 U.S. 563, 574-576 (1989); *Menna* v. *New York*, 423 U.S. 61, 62 (1975). The Court has also allowed a collateral attack upon a plea that resulted from the prosecutor's vindictive filing of more serious felony charges after the defendant had successfully appealed a misdemeanor conviction. See *Blackledge* v. *Perry*, 417 U.S. 21, 29-31 (1974). In both situations, the Court held that the defendant had a right not to be haled into court at all and that the initiation of a criminal prosecution against him violated the Constitution. See *United States* v. *Broce*, 488 U.S. at 574-575.

of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984). Moreover, in defending against a collateral attack on a guilty plea, the State is entitled to rely on the presumption that counsel has supplied the defendant with sufficient information for the defendant to enter a voluntary and intelligent guilty plea. See *Marshall* v. *Lonberger*, 459 U.S. 422, 436-437 (1983); *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976).

Permitting a defendant to challenge a prior guilty plea conviction in a sentence enhancement proceeding would be inequitable in many cases, particularly where the guilty plea was the product of a plea bargain. A defendant who has never had his underlying conviction set aside has retained the advantages he received as part of any plea agreement. He should not be allowed to retain those advantages while preventing the plea from being used to his disadvantage in a later prosecution. In this case, respondent never denied that he was guilty of the 1981 felony, and he testified that he received a "good deal" when he received a sentence far less than the maximum. 5/28/87 Tr. 38-41. The consequence of the Sixth Circuit's ruling in this case is that respondent's "good deal" became even better, while the State was not even given the theoretical opportunity of retrying him on the original charges, which it would have had if he had challenged his guilty plea through habeas corpus.

2. Boykin v. Alabama *Claims Are Not Cognizable On Collateral Review*

In spite of the strong interests in the finality of guilty pleas, the Sixth Circuit held that respondent's 1979 and 1981 guilty plea convictions could not be

used for sentence enhancement. The court did so because the Commonwealth failed to prove that the prior convictions complied with the dictates of this Court's decision in *Boykin* v. *Alabama*. The entire premise of the court of appeals' decision, however, rests on a misapprehension of *Boykin*. The procedures set forth in that case are not themselves constitutional requirements, much less essential components of a criminal trial without which the trial cannot serve as a reliable device for resolving guilt or innocence. Instead, the requirements of *Boykin* are prophylactic rules designed to safeguard certain rights that are implicated when a defendant enters a guilty plea. Thus, a *Boykin* error, even if one were found in this case, would not justify a collateral challenge to the use of the guilty plea convictions for enhancement purposes.

a. The defendant in *Boykin* pleaded guilty to five counts of robbery and was sentenced to death. His conviction and sentence were affirmed, and this Court granted review. Reasoning that a guilty plea is not merely a confession, but a conviction, the Court determined that the record should reflect the valid waiver of each of the rights a defendant gives up by pleading guilty. 395 U.S. at 242-243. In particular, the Court observed that a guilty plea waives (1) the privilege against compulsory self-incrimination, (2) the right to a jury trial, and (3) the right to confront adverse witnesses. *Id.* at 243. Declining to "presume a waiver of these three important federal rights from a silent record," *ibid.*, the Court reversed the defendant's conviction, *id.* at 244.

In so doing, the Court outlined the proper means of placing on the record the elements of a valid plea of guilty. Because of the serious consequences of pleading guilty, the Court indicated that state trial

courts should "canvass[] the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." 395 U.S. at 244. That process, the Court explained, "leaves a record adequate for any review that may later be sought, * * * and forestalls the spin-off of any collateral proceedings that seek to probe murky memories." *Ibid.*

The Court in *Boykin* did not hold, or even suggest, that the plea at issue in that case was not the product of a voluntary and knowing waiver of the defendant's rights. Rather, "[t]he new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Brady* v. *United States*, 397 U.S. 742, 747-748 n.4 (1970). It can hardly be said, therefore, that a trial court's failure to comply with the prophylactic requirements of *Boykin* amounts to an error of constitutional dimension, much less one that implicates fundamental fairness to an extent comparable to the complete denial of the right to counsel.

b. In light of the presumption of regularity accorded to final criminal convictions, it is doubtful whether respondent's collateral attack on his prior convictions even stated a claim for relief under *Boykin*. The court of appeals did not find that the trial judges in those cases had failed to advise respondent of his rights, but based its *Boykin* ruling on the absence of evidence that he had been so advised. Indeed, even respondent's testimony did not establish that the warnings were omitted; although respondent testified that he could not recall having been advised of all of his constitutional rights, he conceded that he might have been so advised. Since both convictions

were entered long after *Boykin* was decided, the presumption of regularity should be sufficient to justify the assumption that, absent proof to the contrary, the appropriate advice was given.

Even if the absence of records was sufficient to call into question whether the plea proceeding complied with *Boykin*, a violation of *Boykin*'s requirements should not be sufficient to justify collateral relief from a final conviction. In light of the interests underlying the finality of criminal judgments, prophylactic rules designed to protect constitutional guarantees but not themselves part of the constitutional right at issue are enforceable on direct review, but not on collateral attack. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 480-482, 491-492 n.31 (1976) (exclusion of evidence under the Fourth Amendment); *United States* v. *Timmreck*, 441 U.S. at 784 (guilty plea advisement requirement in federal courts); see also *Duckworth* v. *Eagan*, 492 U.S. 195, 211-213 (1989) (O'Connor, J., concurring) (claims brought under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), should not be cognizable on collateral review because *Miranda* warnings are prophylactic). This Court's decisions under Fed. R. Crim. P. 11, which governs plea proceedings in the federal courts, confirm that *Boykin* claims should be governed by the same dual approach to direct and collateral review.

As *Boykin* does for state court judges, Rule 11 requires federal judges to address defendants who wish to plead guilty, in order to ensure that the defendants understand the nature and consequences of their pleas. The purpose of Rule 11 is the same as the purpose that underlies *Boykin's* "on-the-record advisement" requirement for guilty pleas. See *Brady* v. *United States*, 397 U.S. at 749 n.6; *Boykin* v. *Ala-*

bama, 395 U.S. at 246-247 (Harlan, J., dissenting). Because a defendant's guilty plea waives "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers," Rule 11 seeks to ensure that his plea is truly voluntary and to create an adequate record for any post-conviction challenge. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). In *McCarthy*, which was decided just two months before *Boykin*, this Court enforced the prophylactic requirements of Rule 11 by reversing a conviction on direct review, because the district judge had not inquired into the defendant's understanding of the charges, as required by Rule 11. 394 U.S. at 472.

The Court subsequently made clear that Rule 11 violations, although they implicate the process by which the voluntariness of a guilty plea is assured, do not call into question the fundamental fairness of the underlying conviction.[6] First, in contrast with its treatment of cases involving the right to counsel under *Gideon* v. *Wainwright*, *supra*, the Court gave *McCarthy* only prospective application. See *Halliday* v. *United States*, 394 U.S. 831 (1969).[7] Although this Court has never spoken to the issue, the courts of appeals have consistently declined to apply *Boykin*

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[6] Indeed, the Court in *McCarthy* made explicit that it was not resting its decision on constitutional grounds, and emphasized that Rule 11 had not been held to be constitutionally required. 394 U.S. at 464-465.

[7] The Court explained that although strict compliance with Rule 11 gave greater assurance of the voluntariness of the plea, the issue of voluntariness could be raised independently of Rule 11. *Halliday* v. *United States*, 394 U.S. at 832-833. Hence, the retroactivity of *McCarthy* was not essential to make certain that a guilty plea was in fact voluntary.

retroactively.[8] That is strong evidence that violations of the prophylactic rules of *Boykin* and Rule 11 are not the kind of errors that necessarily undercut the reliability of a guilty plea. Cf. *Linkletter* v. *Walker*, 381 U.S. at 639 ("in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process").

Second, in *United States* v. *Timmreck*, *supra*, the Court held that a violation of Rule 11's prophylactic requirements, without more, is not cognizable on collateral review. The defendant in *Timmreck* asserted that a Rule 11 violation had occurred because the district court accepted his plea without informing him of a mandatory special parole term. In holding that the defendant's claim was not cognizable under 28 U.S.C. 2255, the Court explained that a formal violation of Rule 11 "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with rudimentary demands of fair procedure." 441 U.S. at 783. For the same reason, a formal violation of the prophylactic requirements of *Boykin* should not be regarded as the kind of error that can be raised when a prior conviction is used for enhancement purposes in a subsequent prosecution.

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[8] See, *e.g.*, *Berry* v. *Mintzes*, 726 F.2d 1142, 1146 (6th Cir.), cert. denied, 467 U.S. 1245 (1984); *United States* v. *Pereira*, 574 F.2d 103, 105 n.5 (2d Cir.), cert. denied, 439 U.S. 847 (1978); *Mathis* v. *Hocker*, 459 F.2d 988, 989 (9th Cir. 1972); *Dominguez* v. *Henderson*, 447 F.2d 207, 209 (5th Cir. 1971) (citing cases); *Meller* v. *Missouri*, 431 F.2d 120, 124 (8th Cir. 1970), cert. denied, 400 U.S. 996 (1971).

II. KENTUCKY LAWFULLY IMPOSED ON RESPONDENT THE BURDEN OF SHOWING THAT HIS PRIOR GUILTY PLEAS WERE NOT KNOWING AND INTELLIGENT

Although, for the reasons set forth above, we do not think they are constitutionally required to do so, the Kentucky courts permit defendants in PFO proceedings to challenge their prior guilty plea convictions on the ground that they failed to comply with *Boykin* v. *Alabama*.[9] Respondent's only objection to the procedure employed by the Kentucky courts in this case was that it imposed on him the burden of showing a violation of *Boykin*. The Sixth Circuit agreed that the Commonwealth's allocation of the burden of proof on that issue was unconstitutional, and that the Commonwealth bore the burden of establishing compliance with *Boykin*.

The burden of proof issue is important in this context, because it will often be difficult, especially for the State, to offer detailed evidence regarding prior guilty plea proceedings. The allocation of the burden of proof therefore may be determinative in many cases as to whether a prior conviction can be used for enhancement.

The Sixth Circuit's rule is contrary to well-established principles governing the allocation of the burden of proof on collateral review of convictions.[10]

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[9] The Kentucky courts have permitted such challenges not because of any requirement of Kentucky law, but because of the perceived compulsion of federal constitutional law. See *Commonwealth* v. *Gadd*, 665 S.W.2d 915, 917 (Ky. 1984). As a matter of state law, the prosecution is required to prove only the fact of a prior qualifying conviction; it is not required to prove "that the previous conviction was not obtained by constitutionally inpermissible means." *Id.* at 918.

[10] In addition, even if the Commonwealth had the burden of proving that respondent made a voluntary and know-

As this Court has explained, a party collaterally attacking a conviction has the burden of showing its invalidity. See, *e.g.*, *Tollett* v. *Henderson*, 411 U.S. 258, 268 (1973); *Johnson* v. *Zerbst*, 304 U.S. at 468-469. That principle is equally applicable to challenges to prior convictions used for enhancement purposes. In *Loper* v. *Beto*, *supra*, both the plurality and the dissenting Justices recognized that a defendant who attacks a prior conviction used for enhancement bears the burden of proving the constitutional invalidity of the prior conviction. 405 U.S. at 479-480 n.4 (opinion of Stewart, J.) (assuming defendant bears the burden); *id.* at 499, 502 (opinion of Rehnquist, J.). There are very strong practical reasons for adhering to this allocation of proof in the context of penalty enhancement proceedings:

> [T]heoretically speaking, any given conviction might suffer any of a myriad of constitutional defects. Practically speaking, it is the defendant, not the probation officer or the Government, who will know any particular defect-related details of any particular prior conviction. For such reasons, the Sentencing Commission (and courts) in related sentencing areas have said that, once the Government establishes the existence of a prior conviction, the burden shifts to

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ing waiver of his constitutional rights, the Sixth Circuit erred in requiring a standard of proof higher than the preponderance of the evidence. This Court has held that the Constitution is satisfied if the prosecution proves the waiver of federal rights by a preponderance of the evidence. See, *e.g.*, *Colorado* v. *Connelly*, 479 U.S. 157, 167-169 (1986) (*Miranda* rights); *Lego* v. *Twomey*, 404 U.S. 477, 487-489 (1972) (confession). There is no basis for requiring a heightened standard for proving a waiver in a sentence enhancement proceeding.

the offender to show that the conviction violated the Federal Constitution.

United States v. *Wilkinson*, 926 F.2d 22, 26 (1st Cir. 1991) (Breyer, C.J.), cert. denied, 111 S. Ct. 2813 (1991). At most, then, respondent would be entitled to collateral relief only if he could supplement the "silent record" with persuasive proof that his prior pleas were not voluntary and intelligent.[11]

In light of these principles, the Sixth Circuit erred in holding respondent's 1981 conviction invalid.[12] The Commonwealth proved that respondent signed a form

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[11] We recognize that, in the right-to-counsel cases, a defendant may establish a prima facie case of error on collateral review by showing that his conviction was uncounseled; a court will not presume from a silent record that the defendant waived his right to counsel. *Burgett* v. *Texas*, 389 U.S. at 114-115. As discussed, however, the right to counsel is a "bedrock procedural rule," see *Mackey* v. *United States*, 401 U.S. at 693-694 (Harlan, J., concurring in the judgments in part and dissenting in part), that is so fundamental that it applies retroactively, see *Burgett* v. *Texas*, 389 U.S. at 114. By contrast, *Boykin* established a prophylactic rule that has not been applied retroactively. In addition, "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. at 465. To presume that a defendant knowingly and intelligently waived his right to counsel by not asking for it would be contrary to the very premise of that right. As we have noted, however, when a defendant who is represented by counsel pleads guilty, there is a presumption that counsel supplied him with the information necessary to enter a valid guilty plea. See *Marshall* v. *Lonberger*, 459 U.S. at 436-437; *Henderson* v. *Morgan*, 426 U.S. at 647.

[12] The Sixth Circuit did not vacate the district court's judgment as it pertained to the 1979 guilty plea, and respondent has not cross-petitioned on that issue.

two years earlier acknowledging that he had been advised of his constitutional rights. Contrary to the court of appeals' reasoning, the district court was entitled to conclude that since respondent had been advised of his rights before pleading guilty in 1979, he was aware of those rights when he pleaded guilty in 1981. Cf. *Marshall* v. *Lonberger*, 459 U.S. at 457 (defendant's experience in criminal justice system is relevant in determining whether he understood his rights).

Moreover, respondent himself admitted that the judge in 1981 specifically questioned him to ensure that his plea was voluntary, and that the judge informed respondent that he "had a right to a jury trial." 5/28/87 Tr. 19-20. Respondent also conceded that the judge "could have said more" and in fact may have advised him of his other rights. *Id.* at 41-42. The essence of respondent's testimony was that he could not remember the trial court's advising him of his rights. Even assuming that a defendant may challenge the voluntariness of his prior guilty plea in a sentence enhancement proceeding, respondent's showing was inadequate to justify holding his 1981 guilty plea invalid. See *United States* v. *Gallman*, 907 F.2d 639, 644 (7th Cir. 1990) ("The lack of explicit proof that [the defendant] was aware of his constitutional rights does not prove that he was unaware of those rights."), cert. denied, 111 S. Ct. 1110 (1991).

In addition, respondent never suggested that he would have declined to plead guilty in 1981 had he been advised of his rights, or that he was not guilty of the crime for which he was convicted. Indeed, he stated that he had discussed the 1981 charges with his counsel, that he was unable to suggest any witnesses

to call, that he admitted committing the charged offenses, and that he pleaded guilty voluntarily to get what he believed was a "good deal." 5/28/87 Tr. 38-41. Hence, there is no persuasive reason to forbid the Commonwealth from using respondent's 1981 guilty plea conviction to enhance the sentence imposed on his 1987 robbery conviction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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91-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AL C. PARKE, Warden,

Petitioner,

vs.

RICKY HAROLD RALEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

When a defendant challenges the constitutional validity of a prior conviction in sentencing proceedings:

1. Who has the burden of proof?

2. By what measure must validity or invalidity be proven?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AL C. PARKE, Warden,

Petitioner,

vs.

RICKY HAROLD RALEY,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of petitioner in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that federal law permits a state to place the burden of proof of invalidity of prior convictions on the defendant. Further, *amicus* argues that preponderance of the evidence is the appropriate standard.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and

reliable determination of guilt and swift execution of punishment.

Consideration of prior convictions is an essential part of modern sentencing. Without such consideration, the first offender would be treated identically with the hardened criminal. Under the standard promulgated by the Sixth Circuit, prior convictions would be arbitrarily ignored based on the mere chance occurrence of the disappearance or destruction of the transcript, combined with the state's inability to prove *Boykin* compliance by "clear and convincing" evidence without the transcript. Whether a hardened criminal is sentenced appropriately would depend on a random factor totally irrelevant to his actual culpability. Such arbitrariness is contrary to the rights CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

April, 1992

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1991

AL C. PARKE, Warden,

Petitioner,

vs.

RICKY HAROLD RALEY,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

Respondent Ricky Raley was indicted in 1986 for robbery and for being a persistent felony offender. The latter allegation, if proven, results in an enhanced sentence. Ky. Rev. Stat. § 532.080. The allegation was based on two guilty pleas from 1979 and 1981. App. Pet. Cert. A27.

Raley moved to suppress the two prior convictions. He testified that he could not remember whether the trial judge had advised him of his rights. Raley's 1979 defense lawyer verified his signature on a form certifying that he had fully explained Raley's rights to him in those proceedings. *Id.*, at A31. No similar documentation was introduced for the 1981 conviction. *Id.*, at A32.

The trial court denied the motion to suppress. The Kentucky Court of Appeals affirmed in an unpublished opinion. *Id.*, at A33. The Kentucky Supreme Court denied discretionary review. The federal district court

denied habeas corpus. *Id.*, at A22-A25. The Court of Appeals for the Sixth Circuit reversed. *Raley* v. *Parke*, 945 F. 2d 137 (1991). The Court of Appeals reaffirmed its holding in *Dunn* v. *Simmons*, 877 F. 2d 1275 (CA6 1989) that unavailability of a transcript places "the burden on the Commonwealth to prove that he knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to remain silent." *Raley*, 945 F. 2d, at 140. The Court of Appeals went on to hold that the *Dunn* burden had not been met as to the 1981 conviction. *Id.*, at 142.[1]

SUMMARY OF ARGUMENT

A motion to suppress prior convictions is a collateral attack. When a final judgment is collaterally attacked, the burden is generally on the attacker to prove his factual allegations by a preponderance of the evidence. This Court so held in the landmark case of *Johnson* v. *Zerbst*, and numerous cases have reaffirmed that holding.

The better reasoned cases from the federal appellate courts and the state courts place the burden of proof on the defendant in the circumstances of this case. Kentucky's rule of *Dunn* v. *Commonwealth* is more generous to the defendant than federal law requires.

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1. Because this case arose on federal habeas corpus, the Commonwealth could have argued that *Dunn* v. *Simmons* is a "new rule" under *Teague* v. *Lane*, 489 U. S. 288 (1989). No precedent binding on state courts incorporates the *Dunn* rule or dictates that result. However, the Commonwealth was aware of this argument and chose not to include it in the petition for certiorari, and the Court need not raise the issue *sua sponte*. *Collins* v. *Youngblood*, 111 L. Ed. 2d 30, 38, 110 S. Ct. 2715, 2718 (1990). *Amicus* respectfully suggests a note to this effect to avoid the implication that *Teague* would have been inapplicable if raised. Cf. Brief *Amicus Curiae* of the American Bar Association in *Wright* v. *West*, No. 91-542, at 21-22.

ARGUMENT

I. A motion to suppress or strike a prior conviction is a collateral attack on a final judgment.

A. Judgments: Void, Voidable, Erroneous and Correct.

Judgments are not cleanly divided into "valid" and "invalid" judgments. Instead, they lie along a spectrum of vulnerability. At one end of the spectrum is the judgment which is absolutely void. Normally the only defect severe enough to cause absolute voidness is a lack of jurisdiction. Imprisonment under such a judgment would itself be a crime. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830).

At the other extreme are the vast majority of judgments. They have been validly rendered by courts of competent jurisdiction in proceedings free of reversible error. Such judgments will be affirmed if they are appealed and will be enforced in the face of any collateral attack.

The middle of the spectrum consists of judgments rendered erroneously by courts of competent jurisdiction. These judgments differ from each other in their degree of vulnerability. Some types of errors may be attacked at some stages of the process but not at others. A judgment may have been entered after the erroneous admission of an important piece of evidence. Such a judgment would be reversible on appeal. In most cases, however, it would not be vulnerable to collateral attack.[2] If no appeal is taken or if the judgment is affirmed on appeal, even erroneously, the judgment is no longer subject to question.

More fundamental defects will result in a judgment being "voidable," i.e., subject to being set aside in a collateral attack such as habeas corpus. Such a judgment is nonetheless "valid" in the sense that executive officers

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2. This is true even if the ground for exclusion is the Fourth Amendment. Such a claim will not be considered on federal habeas if the state provides an opportunity for full and fair litigation of the claim. *Stone* v. *Powell*, 428 U. S. 465, 481-482 (1976).

may properly execute it until such time as it is actually set aside. The legislative branch may attach civil disabilities, enforceable by criminal sanctions, which also apply until the judgment is actually set aside. *Lewis* v. *United States*, 445 U. S. 55, 67 (1980) (firearm possession by felon).

The status of a judgment as "voidable" is not necessarily static. Upon successful completion of habeas corpus proceedings, the judgment becomes void rather than merely voidable. See *id.*, at 61, n. 5. On the other hand, the right to challenge a judgment may be lost by the passage of time, see Rule 9(a) of the Rule Governing Section 2254 Cases in the United States District Courts, or by the failure to invoke the usual appellate remedies, see *Murray* v. *Carrier*, 477 U. S. 478, 490-491 (1986).

B. Voidable Judgments and Habitual Criminals.

The defendant's criminal history is an essential factor in any modern system of sentencing. Without consideration of prior convictions, the first offender would be treated identically with the incorrigible recidivist, a morally repugnant result. Thus, habitual criminal statutes "reflect[] widely established policies in the criminal law of this country." *Spencer* v. *Texas*, 385 U. S. 554, 555 (1967).

In Kentucky, "[a] persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony *after having been convicted of two (2) or more felonies*." Ky. Rev. Stat. § 532.080(3) (emphasis added). Where the prior judgment is voidable but not void, two separate questions arise. First, has a person whose prior convictions are voidable "been convicted" within the meaning of the statute? Stated differently, is the validity of the priors an element of the recidivist classification? Second, where the voidability of the priors is based on a constitutional claim, does that same claim present a constitutional barrier to the use of the prior convictions to enhance the subsequent sentence?

Lewis, *supra*, considered the statutory and constitutional issues separately in parts III and IV of the opinion. 445 U. S., at 60-68. In a case arising from a state statute, a

federal court *must* consider the issues separately. The statutory question is purely one of state law. The Kentucky Supreme Court is, of course, the final authority on construction of state statutes. By placing the initial burden on the defendant, *Dunn* v. *Commonwealth*, 703 S. W. 2d 874 (1986), the Kentucky Supreme Court necessarily held that validity of the prior is not an element which must be proven by the prosecution in its case in chief. See also *Curl* v. *Superior Court*, 51 Cal. 3d 1292, 1306, n. 8, 801 P. 2d 292, 300 (1990) (prior conviction of murder as "special circumstance" for death penalty; validity not an element).

The second question, however, is a federal constitutional question. Past cases have held that convictions obtained in violation of the right to counsel may be used to establish a firearms violation, *Lewis*, *supra*, but may not be used for recidivist sentencing, *Burgett* v. *Texas*, 389 U. S. 109 (1967), consideration in a discretionary sentencing system, *United States* v. *Tucker*, 404 U. S. 443 (1972), or impeachment, *Loper* v. *Beto*, 405 U. S. 473 (1972). *Marshall* v. *Lonberger*, 459 U. S. 422 (1983) seems to imply a *Burgett* limitation on guilty pleas obtained in violation of the rule of *Boykin* v. *Alabama*, 395 U. S. 238 (1969).

Assuming that *Burgett* applies to this case, what is the nature of a motion to suppress an otherwise admissible conviction on the ground that its use would violate a federal constitutional right? *Lewis* referred to such a motion as a collateral attack. 445 U. S., at 67. So did *United States* v. *Mendoza-Lopez*, 481 U. S. 828, 839 (1987). So has the United States Sentencing Commission. *Guidelines Manual* § 4A1.2, Commentary, last para., 271 (1991 ed.). *Amicus* submits that this characterization is correct.

The usual rule of litigation is that a final judgment settles the matter for all time between the parties. Judgment was rendered against Raley by courts of competent jurisdiction that he committed the prior offenses. Those judgments would normally be conclusive. Any claim that they are not conclusive made in this new proceeding is, by definition, a collateral attack on those

judgments. See Black's Law Dictionary 261, cl. 2 (6th ed. 1991).

As we will show in the next part, the usual rule is that the party collaterally attacking a judgment has the burden of proof. As a matter of state law, a state may alter this rule to the defendant's benefit. Kentucky has permitted the defendant to shift the burden to the state upon the mere production of evidence. *Dunn* v. *Commonwealth*, *supra*, 703 S. W. 2d, at 876. For drunk driving cases, the California Legislature has placed on the prosecution a burden of proof beyond a reasonable doubt. Cal. Veh. Code § 41403. State-imposed burdens, however, are no concern of a federal court on habeas corpus. *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991); *Oyler* v. *Boles*, 368 U. S. 448, 456-457 (1962). The only question is whether the state procedure fell below the federal constitutional minimum. The state is within its rights to place on the defendant the same burden of proof as the challenger bears in any other collateral attack.

II. In a collateral attack, the attacker has the burden of proof by a preponderance of the evidence.

For as long as collateral attacks on judgments of courts of general jurisdiction have been allowed, the burden has always been on the person challenging the judgment. "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." *Voorhees* v. *Jackson*, 10 Pet. (35 U. S.) 449, 472 (1836). This principle remains well settled today.

A. Supreme Court Cases.

Because the *Boykin* rule is a rule involving waiver of rights, it is best to begin with the classic case of *Johnson*

v. *Zerbst*, 304 U. S. 458 (1938).[3] Johnson had been convicted in a federal court for counterfeiting. *Id.*, at 459. He had not been represented by counsel. Although he had not specifically requested counsel from the court, *id.*, at 460-461, he claimed not to have waived counsel.

Against the government's contention that Johnson had waived his right by failure to request counsel, Justice Black wrote his now-famous pronouncement for the Court:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.*, at 464 (footnotes omitted).

Taken alone, this passage might be taken to imply that the "presumption against waiver" shifts the burden of proof to the government to prove nonwaiver. Justice Black dispelled this misconception in no uncertain terms.

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, *the burden of proof rests upon him* to establish that he did not competently

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3. Most of the cases discussed in this section involve the right to counsel. The defendant's burden on a *Boykin* claim should be *at least* as high as it is on a right to counsel claim. See *People* v. *Sumstine*, 36 Cal. 3d 909, 922, 687 P. 2d 904, 913 (1984).

and intelligently waive his constitutional right to assistance of counsel.

* * *

"*If petitioner fails to sustain this burden, he is not entitled to the writ.*" *Id.*, at 468-469 (emphasis added, footnotes omitted).

In subsequent habeas corpus cases, this Court repeatedly reaffirmed the rule of *Johnson* v. *Zerbst*: the burden is on the petitioner to prove his factual allegations by a preponderance of the evidence. *Walker* v. *Johnston*, 312 U. S. 275, 286 (1941); *Hawk* v. *Olson*, 326 U. S. 271, 279 (1945); *Darr* v. *Burford*, 339 U. S. 200, 218 (1950), overruled on other grounds in *Fay* v. *Noia*, 372 U. S. 391, 435 (1963); *Brown* v. *Allen*, 344 U. S. 443, 458, n. 6 (1953).

United States v. *Morgan*, 346 U. S. 502 (1954) placed the burden of proof on a petitioner in circumstances similar to the present case. Morgan was convicted in federal court, served his sentence, and received a heavier sentence for a subsequent state offense because of the prior federal conviction. *Id.*, at 503-504. He sought federal coram nobis to challenge the prior conviction under *Johnson* v. *Zerbst*. *Morgan*, 346 U. S., at 504. The Court allowed the coram nobis hearing to proceed, but placed the burden of proof squarely on the petitioner. "Of course, the absence of a showing of waiver from the record does not of itself invalidate the judgment. It is presumed the proceedings were correct and *the burden rests on the accused to show otherwise*." *Id.*, at 512 (emphasis added).

In *Moore* v. *Michigan*, 355 U. S. 155, 156 (1957), the petitioner claimed, on state collateral review, that although he had waived counsel his waiver was not knowing and intelligent. The Court followed *Johnson* v. *Zerbst*, *supra*, holding that "the petitioner had the burden of showing, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel." 355 U. S., at 161-162.

In *Carnley* v. *Cochran*, 369 U. S. 506 (1962), the petitioner affirmatively alleged that he had requested

counsel, and the return did not allege an express waiver of counsel. *Id.*, at 516, n. 10. Nevertheless, the state supreme court presumed a waiver from the mere fact of defendant's appearance at trial without counsel, and denied habeas corpus without a hearing. *Id.*, at 513. The United States Supreme Court held this presumption impermissible.

> "Nor is it an answer to say that he may counter such presumptions on collateral attack by showing—if he can—that he had not in fact agreed, or been willing, to be tried without counsel. To cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel which we laid down in *Johnson* v. *Zerbst*, 304 U. S. 458, 464-465 . . . ." *Id.*, at 514.

This language might, on its face, support the notion that the burden of proving waiver is on the government, but a closer examination reveals that *Carnley* makes no such holding. First, the opinion itself declares absolute fidelity to *Johnson* v. *Zerbst*, which unequivocally places the burden on the petitioner.[4] More importantly, the Court treated this case as one of undisputed facts. Between the petitioner's allegation that he requested counsel and the absence of any allegation of waiver in the return, nonwaiver was established by the pleadings. *Id.*, at 516, n. 10. Under these circumstances, there is no burden of proof issue. The statement quoted is *dictum* and does not overrule the clear holdings of *Johnson*, *Morgan*, and *Moore*.

In *Burgett* v. *Texas*, 389 U. S. 109, 112 (1967), the record of the prior conviction from Tennessee stated that the defendant appeared "in proper person and without Counsel." The Court stated "the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel. . . . " *Id.*, at 114. It seems most unlikely that the Supreme Court would so casually overrule the square holding of a land-

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4. See *ante*, at 7-8.

mark case like *Johnson* v. *Zerbst*, *supra*, and these two holdings should be reconciled, if possible.

Johnson v. *Zerbst* placed the burden on the petitioner because of the presumption of regularity. 304 U. S., at 468-469. As a federal defendant, Johnson had an established constitutional and statutory right to counsel at the time of his 1934 trial. See *Powell* v. *Alabama*, 287 U. S. 45, 73 (1932). It seems appropriate to presume that the federal district judge did his duty under the Sixth Amendment and the federal statute, absent proof to the contrary. At the time of Burgett's trial in Tennessee, however, the Sixth Amendment was not applicable to the states. *Betts* v. *Brady*, 316 U. S. 455, 461 (1942), overruled in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). There is no basis for presuming that the state trial judge obtained a waiver of a right which Burgett did not then possess. It is quite logical to presume he did not. In *Loper* v. *Beto*, 405 U. S. 473 (1972), the plurality explicitly relied on this logic: "And the fact that the challenged convictions occurred . . . [before *Gideon*] would make any such finding [of waiver of counsel] highly unrealistic . . . . For, at the time of the petitioner's previous convictions, there was no known constitutional right to be 'waived.' " *Id.*, at 479, n. 6. This footnote is a response to Justice Rehnquist's dissent, and it does not challenge his assertion that *Johnson* v. *Zerbst* generally places the burden of proof on the petitioner. See *id.*, at 499-503 (Rehnquist, J., dissenting).

The *Burgett* "presumption" is thus a product of the unusual circumstance of a retroactive decision invalidating convictions obtained under procedures which were legal at the time, undercutting the basis of the usual presumption of regularity. The prior guilty pleas in the present case were taken long after *Boykin*, and therefore the usual rule of *Johnson* v. *Zerbst* should apply.

Recent Supreme Court cases contain little discussion of the burden of proof on collateral attack. The *Johnson* v. *Zerbst* rule appears to be so well settled that no discussion is needed. The only recent word we have found is an approving citation of *Moore* v. *Michigan*, *supra*, in *Colorado* v. *Connelly*, 479 U. S. 157, 168-169 (1986) (reaffirming

the preponderance of the evidence standard in *Miranda* cases).

B. Other Authorities.

1. Federal courts of appeals.

In rejecting the Commonwealth's attack on *Dunn* v. *Simmons*, the Sixth Circuit drew a distinction which, *amicus* submits, is without a difference. It dismissed as "irrelevant" all cases dealing with whether a prior conviction can be counted under the federal Sentencing Guidelines. *Raley* v. *Parke*, 945 F. 2d 137, 141 (1991). On the contrary, such cases are quite relevant. *United States* v. *Tucker*, 404 U. S. 443, 449 (1972) applied the rule of *Burgett* v. *Texas*, 389 U. S. 109, 114 (1967) to the discretionary sentencing regime that existed before the Guidelines. The implication of *Tucker* is that the manner in which the sentencing system uses prior convictions is irrelevant. A prior conviction either can be constitutionally used in sentencing or it cannot. Whether the use is in a recidivist statute, as in *Burgett* and the present case, a discretionary system, as in *Tucker*, or a guideline system, as in some of the more recent federal cases discussed in this section, the same rule applies. If federal courts applying the Guidelines can constitutionally impose the burden of proof on the defendant, a state court can surely do the same.

Indeed, to the extent that state and federal cases differ, that difference weighs in favor of the state. This Court has a general supervisory power over federal courts but not state courts. *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967). The two Due Process Clauses are worded identically. U. S. Const. amend. V; *id.*, amend. XIV, § 1. Any procedure for determining the validity of a prior conviction which is constitutional in a federal trial in federal district court necessarily meets the federal constitutional minimum for state trials. There is another distinction, however, which does make a difference but is frequently overlooked. It is important to distinguish between those cases where the record is available but shows no *Boykin* compliance, on the one hand, and the "lost transcript"

cases on the other. Most statements about a "silent record" placing a burden on the government fall into the former category.

Typical of the former is *Roddy* v. *Black*, 516 F. 2d 1380 (CA6 1975). In that case there were two indictments. The transcript was available, and "it appears that the trial judge asked Appellant whether he was willing to plead guilty to 'assault and battery' on both indictments, but convicted him of assault and battery on only one and of immoral and indecent practices on the other." *Id.*, at 1385. Given this state of the record, the state was permitted to prove the plea was knowing and intelligent, but only by clear and convincing evidence. *Id.*, at 1384, 1386.

United States v. *Pricepaul*, 540 F. 2d 417 (CA9 1976)[5] is similar. The record of the prior in *Pricepaul* consisted of a detailed minute order in a California case. The order described the waivers obtained, but the *Boykin* waivers were not among them. *Id.*, at 419, n. 2. The court held that defendant's submission of this record was sufficient to shift the burden to the government. *Id.*, at 424. *Sena* v. *Romero*, 617 F. 2d 579 (CA10 1980) and *Todd* v. *Lockhart*, 490 F. 2d 626 (CA8 1974) are also frequently cited for the proposition that an available transcript showing noncompliance with *Boykin* on its face shifts the burden to the government.

The second and more apposite group is the "lost transcript" line of cases, beginning with *Clayton* v. *Blackburn*, 578 F. 2d 117 (CA5 1978). Clayton contended on habeas corpus that the trial judge had not complied with *Boykin*. The facts regarding Clayton's conviction were quite similar to those of Raley's 1981 prior. No transcript was available, and Clayton himself could not clearly remember whether he had been advised of his rights. *Id.*, at 118-119. The court held Clayton's showing insufficient.

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5. *Pricepaul* was effectively overruled on other grounds by *Lewis* v. *United States*, 445 U. S. 55 (1980). See *United States* v. *Goodheim*, 651 F. 2d 1294, 1297 (CA9 1981).

> "The purpose of *Boykin* hearings, besides protecting defendants, is to help assure the finality of state court convictions in order to avoid collateral hearings in which memories become hazy and the evidence uncertain. Where no transcript is made or available of a guilty plea hearing, that purpose is obviously frustrated. [Citation.]
>
> "However, *it is still the petitioner's burden* in a habeas proceeding to demonstrate, at least prima facie, those facts that establish a constitutional violation." *Id.*, at 120 (emphasis added).

Clayton is different from *Roddy*, *Pricepaul*, *Sena*, and *Todd*. Instead of a record showing noncompliance on its face, which makes the petitioner's *prima facie* case, there is no record at all. At least where the lack of a record is not due to government misconduct, that leaves the burden where it originally rested: on the party challenging the validity of the judgment. The *Clayton* rule was reaffirmed in *Walker* v. *Maggio*, 738 F. 2d 714 (CA5 1984). The court held unequivocally that the burden was on the petitioner. *Id.*, at 716-717. The Fifth Circuit followed *Walker* in a similar federal case, *United States* v. *Woods*, 870 F. 2d 285, 287 (1989).

The lead opinion in *Honeycutt* v. *Ward*, 612 F. 2d 36 (CA2 1979) took a similar view. A prior used to enhance the sentence was attacked on *Gideon* grounds, and the only evidence was the minute order and Honeycutt's own testimony. *Id.*, at 39. Reversing the trial court's grant of habeas corpus, the lead opinion stated "the burden of proof is on Honeycutt to overcome the strong presumption of regularity in state judicial proceedings. His own self-serving declarations do not meet this burden." *Id.*, at 41.

The Seventh Circuit adopted a slightly different approach in *United States ex rel. Grundset* v. *Franzen*, 675 F. 2d 870 (1982). According to the *Grundset* court, the petitioner must first make a *prima facie* case of a constitutional violation. *Id.*, at 877 (citing *Clayton* and *Todd*). If he does, "the burden shifts to the State to show the voluntariness of the plea." *Id.*, at 878 (citing *Sena*,

Pricepaul and *Todd*). The burden-shifting language is *dictum*, however, as the holding of the case is that Grundset did not meet his initial burden. *Id.*, at 879. The Eleventh Circuit adopted a burden-shifting rule in *Fox* v. *Kelso*, 911 F. 2d 563, 570 (1990).

In 1984, Congress passed the Sentencing Reform Act which created a Sentencing Commission with broad authority to revamp federal sentencing. See generally, *Mistretta* v. *United States*, 488 U. S. 361, 367-370 (1989). As originally promulgated, the Sentencing Guidelines authorized the defendant to attack the validity of his priors but placed the burden of proof squarely on him. "Any other sentence [other than those previously vacated] resulting in a valid conviction is to be counted in the criminal history score. Convictions *which the defendant shows* to have been constitutionally invalid may not be counted in the criminal history score." United States Sentencing Commission, *Guidelines Manual* § 4A1.2, App. Note 6, 203 (1987 ed.) (emphasis added).[6]

Federal courts applying this Guideline have found no impediment to carrying it out as written. *United States* v. *Dickens*, 879 F. 2d 410, 411-412 (CA8 1989) (preponderance burden on defendant); *United States* v. *Davenport*, 884 F. 2d 121, 124 (CA4 1989); *United States* v. *Unger*, 915 F. 2d 759, 761 (CA1 1990).

In *United States* v. *Newman*, 912 F. 2d 1119 (1990), the Ninth Circuit rejected both its "burden-shifting" language from *Pricepaul*, *supra*, and its "clear and convincing" *dictum* from *United States* v. *Goodheim*, 686 F. 2d 776, 777 (1982). Both were overridden by the Guidelines. *Newman*, 912 F. 2d, at 1122, nn. 3-4. If a standard can be overridden by the Guidelines, that standard must not be constitutionally mandated. Whatever authority the Sentencing Commission may have, it certainly cannot amend the Constitution. If a standard is not constitution-

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6. The Application Note has since been amended to be even harder on defendants challenging their priors. See *United States* v. *Hewitt*, 942 F. 2d 1270, 1276 (CA8 1991).

ally mandated, there is no legitimate basis for imposing it on the states. *Spencer*, *supra*, 385 U. S., at 564.

In *Dunn* v. *Simmons*, 877 F. 2d 1275, 1278 (1989), the Sixth Circuit castigated the Kentucky Supreme Court for violating "federal standards" by placing a mere burden of *producing evidence* on a defendant who challenged his prior conviction on *Boykin* grounds. Yet in *United States* v. *Bradley*, 922 F. 2d 1290, 1297 (1991), the Sixth Circuit followed the other circuits in imposing the greater burden of *proof* on a federal defendant making the same claim. Then the present case reaffirmed *Dunn* despite *Bradley*. *Raley*, *supra*, 945 F. 2d, at 141. The Sixth Circuit seems oblivious to the absurdity of imposing a "federal" standard on the co-equal state judiciary *more* stringent than the standard the same court imposes on its own subordinate district courts.

Another line of cases involves the Armed Career Criminal Act, 18 U. S. C. § 924(e). A felon in possession of a firearm who would otherwise be sentenced to 10 years or less will instead be sentenced to 15 years or more, without probation or parole, if he has been convicted of 3 violent felonies or serious drug offenses. *Ibid.*; cf. *id.*, subd. (a)(2). Applying this statute, the Seventh Circuit held in *United States* v. *Gallman*, 907 F. 2d 639, 644 (1990) (emphasis in original) that "[t]he lack of explicit proof that Gallman was aware of his constitutional rights does not prove that he was unaware of those rights. The burden is on Gallman to provide evidence *showing* that his earlier conviction was unconstitutional." *Gallman* was followed in *United States* v. *De Forest*, 946 F. 2d 523, 526 (CA7 1991).

In summary, the overwhelming weight of federal authority supports a preponderance standard of proof, with the initial burden of proving at least a *prima facie* case on the defendant. In *every* circuit other than the Sixth which has squarely considered the question, the Kentucky procedure would be upheld. Furthermore, federal criminal cases have dropped even the "burden-shifting" approach and simply stated that the defendant

has the burden of proving invalidity. As we will show below, this is the preferable approach.

2. Federal statute.

A statute enacted by Congress for the sentencing of repeat offenders in federal courts is, of course, not controlling of the present question. Nonetheless, the opinion of the branch of government specifically charged with the enforcement of the Fourteenth Amendment, U. S. Const. amend. XIV, § 5, as to what process is due surely deserves great weight in evaluating Raley's federal due process claim.

In sentencing proceedings for drug offenders, Congress has provided a procedure for challenging the validity of the priors. 21 U. S. C. § 851. The statute is crystal clear. "The person [challenging the prior judgment] shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response." *Id.*, subd. (c)(2).[7]

3. State courts.

In *People* v. *Harris*, 61 N. Y. 2d 9, 459 N. E. 2d 170 (1983), the New York Court of Appeals held that once the fact of the prior conviction is proven, defendant bears the burden of *proving* its unconstitutionality. *Id.*, at 15, 459 N. E. 2d, at 172.[8] Texas also places the burden of proof on the defendant, at least with respect to right-to-counsel claims.[9] *Disheroon* v. *State*, 687 S. W. 2d 332, 334 (Tex. Crim. App. 1985).

The Utah Supreme Court provided a survey of state decisions in a right-to-counsel case, *State* v. *Triptow*, 770 P. 2d 146 (Utah 1989). *Triptow* identified three divergent

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7. The "response" is the defendant's pleading asserting the invalidity. *Ibid.*

8. Although the decision refers to a statute, *ibid.*, the text of that statute does not answer the question. See N. Y. Crim. Proc. L. § 400.21, subd. 7(b).

9. See note 3, *ante*, at 7.

views: (1) placing the burden of proof of unconstitutionality on the defendant by a preponderance of the evidence; (2) requiring the prosecution to prove representation or waiver by at least a preponderance as part of its case in chief; and (3) placing the burden of production of evidence on the defendant but shifting the burden of persuasion to the state upon the defendant's production of any evidence. *Id.*, at 148. The Utah court identifies Florida, New Jersey, and Rhode Island as being in the first group;[10] Hawaii, Kansas, and Ohio as being in the second; and Indiana, Maryland, and North Carolina as being in the third. *Ibid.* The *Triptow* court joins the third group, *id.*, at 149, and Kentucky did the same in *Dunn* v. *Commonwealth*, 703 S. W. 2d 874, 876 (1986).

One of the most thorough analyses in the case law to date is that of the California Supreme Court in *Curl* v. *Superior Court*, 51 Cal. 3d 1292, 801 P. 2d 292 (1990). Curl was accused of murder with the "special circumstance" of prior conviction of murder. No transcript of the plea colloquy on the prior was available. However, there was a minute order reflecting advisement and waiver, and the trial judge and defense counsel from the prior case testified regarding their habit and custom of advising defendants in plea proceedings. The trial court denied the motion to strike the prior, finding that the prosecution had proven compliance with *Boykin-Tahl*[11] by clear and convincing evidence, but the court noted that Curl would have prevailed had the standard been proof beyond a reasonable doubt. *Id.*, at 1296-1298, P. 2d at 293-295.

Following the same pattern which this Court followed in *Lewis* and *Mendoza-Lopez*, see *ante*, at 4-5, the *Curl* court first determines as a matter of statutory construction

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10. As discussed above, we would also include New York and Texas.

11. *In re Tahl*, 1 Cal. 3d 122, 460 P. 2d 449 (1969) was California's stringent interpretation of *Boykin* in effect at the time. It has since been overruled. *People* v. *Howard*, 1 Cal. 4th 1132, 1178, ___ P. 2d ___, ___ (1992).

that validity of the prior was not an element of the special circumstance. 51 Cal. 3d, at 1299-1302, 801 P. 2d, at 295-297.[12] *Curl* then proceeds to the constitutional analysis. Relying largely on this Court's precedents discussed in part II A, *ante*, at 6-11, *Curl* concludes that the defendant has the burden of proof. *Id.*, at 1305, P. 2d, at 299.

Curl also rejects the notion of shifting burdens in motions to strike prior convictions on constitutional grounds. The procedure laid out in *Curl* is straightforward. The prosecution has the burden of proving the fact of the prior conviction. The magnitude of that burden is set by state law. A defendant who argues that a prior conviction cannot be constitutionally used despite the fact of its existence bears the burden of proving the factual basis of that claim. *Id.*, at 1306-1307, P. 2d, at 300. "[T]he burden of proof on [validity of the prior] shall remain with the defendant." *Id.*, at 1307, P. 2d, at 300; cf. Rule 301 of the Federal Rules of Evidence. The magnitude of the burden, *Curl* went on to hold, was preponderance of the evidence, based on state evidence law, *Johnson* v. *Zerbst*, *supra*, and *Lego* v. *Twomey*, 404 U. S. 477 (1972). *Curl*, 51 Cal. 3d, at 1305-1306, 801 P. 2d, at 299-300.

C. Silent Records v. Missing Records.

> " 'Is there any other point to which you would wish to draw my attention?' [said the inspector.]
>
> " 'To the curious incident of the dog in the night-time.'
>
> " 'The dog did nothing in the night-time.'
>
> " 'That was the curious incident,' remarked Sherlock Holmes."

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12. The intermediate appellate court had construed the statute to include constitutional validity in the "truth" of the prior murder circumstance, thus entitling the defendant to both jury trial and proof beyond a reasonable doubt. See *id.*, at 1298-1299, P. 2d, at 295; *id.*, at 1307-1309, P. 2d, at 301-303 (Mosk, J., concurring in the judgment).

> A. Doyle, *The Adventure of Silver Blaze, The Memoirs of Sherlock Holmes* (1894), reprinted in *The Original Illustrated Sherlock Holmes* 196-197.

In a modern guilty plea proceeding, we expect the transcript to show the *Boykin* advisements and waivers. If the transcript is available and makes no mention of these things, that "silence" is like the failure of Holmes's dog to bark. It is a "curious incident" indicating a likelihood that proper procedures were not followed. See *Sena* v. *Romero*, 617 F. 2d 579, 580-581 (CA10 1980). "It [is] error, *plain on the face of the record* for [a] trial judge to accept [a defendant's] guilty plea without an affirmative showing that it was intelligent and voluntary." *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969) (emphasis added).

On the other hand, where the transcript is not available and the circumstances of its disappearance are unremarkable, the "silence" implies nothing at all. Had no one been around to hear whether the dog barked or not, the incident would not have been the least bit curious. Absence of evidence, when properly explained, is not evidence of absence. Once this distinction is recognized, the key cases drop into place.

A defendant can make a *prima facie* case by submitting a record of the proceeding where the "affirmative showing" described in *Boykin* would normally be recorded, but which does not contain such a showing. Most of the cases "shifting" the burden to the state in such circumstances are merely holding that the presumption of regularity is not conclusive, and that a record which is silent where the showing would normally be found is sufficient to rebut the presumption and establish the defendant's *prima facie* case. See *Todd* v. *Lockhart*, 490 F. 2d 626, 628-629 (CA8 1974); *United States* v. *Pricepaul*, 540 F. 2d 417, 424 (CA9 1976); *Roddy* v. *Black*, 516 F. 2d 1380, 1384 (CA6 1975); *Sena* v. *Romero*, *supra*, 617 F. 2d, at 580-581.

If no transcript is available, that unavailability is not evidence for either side. The burden remains with the defendant to show, with whatever evidence is available, that the earlier proceeding did not meet constitutional requirements. If he succeeds in proving a *prima facie*

case, the ball is *effectively* in the prosecution's court. See *Walker* v. *Maggio*, 738 F. 2d 714, 717 (CA5 1984); *United States* v. *Dickens*, 879 F. 2d 410, 412 (CA8 1989); *People* v. *Harris*, 61 N. Y. 2d 9, 15, 459 N. E. 2d 170, 172 (1983). This should not be thought to be a shift in the burden of persuasion, however, but simply a recognition that a *prima facie* case requires judgment in favor of the party making it, absent an effective rebuttal. See *Kelly* v. *Jackson*, 6 Pet. (31 U. S.) 622, 632 (1832).

The correct rule, *amicus* submits, is the one adopted by the federal courts in the Guidelines and Armed Career Criminal Act cases and by New York, Texas, and California: the burden is on the defendant by the preponderance of the evidence both initially and finally. This rule is consistent with the precedents established in *Johnson* v. *Zerbst*, *United States* v. *Morgan*, and *Moore* v. *Michigan*. See *ante*, at 6-8.

The rule adopted by the Seventh Circuit in *Grundset* and the Eleventh Circuit in *Fox*, shifting the burden upon *prima facie* proof by defendant, is a needless complication with little practical effect. If the defendant produces no evidence or insufficient evidence, the state prevails. See *Grundset*, *supra*, 675 F. 2d, at 879. If the defendant presents sufficient evidence and the state produces none, the defendant prevails. If both sides produce adequate evidence, the one with the stronger case prevails. The allocation of the ultimate burden of persuasion under a preponderance standard makes relatively little difference in this situation. The allocation decides the issue only when the evidence is so evenly balanced that the fact-finder is unable to find that the evidence on either side of an issue preponderates, something which rarely happens. See C. McCormick, *Evidence* § 307, at 639, n. 2 (1st ed. 1954).

The rule adopted by Kentucky and Utah, shifting the burden upon production of *any* evidence by the defendant, violates the rule of *Johnson* v. *Zerbst*, gives too little respect to the dignity of courts and judgments, and invites perjury in cases where defendant has nothing to lose. States may adopt such rules if they choose, but nothing in

the federal Constitution or this Court's precedents compels such a procedure. The rule adopted by the Sixth Circuit, placing the burden on the prosecution to prove the validity of the judgment *without* any evidence against validity, is patently erroneous.

Applying the rule of *Dunn* v. *Commonwealth*, *supra*, the state court evaluated the evidence under a standard more generous to the defendant than federal law requires. Under 28 U. S. C. § 2254(d) as construed in *Marshall* v. *Lonberger*, 459 U. S. 422, 435 (1983), the District Court was required to defer to the state court's factual findings. The District Court properly denied habeas corpus.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

April, 1992

Respectfully submitted,

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Criminal Justice Legal Foundation

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NO. 91-719

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN, PETITIONER

versus

RICKEY HAROLD RALEY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Rule 15.7..... 1

Medina v. California,
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Spencer v. Texas,
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(1983)..... 1

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Commonwealth v. Gadd,
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Robards v. Rees,
789 F.2d 379 at 385-386
(6th Cir. 1986)..... 3

Lewis v. United States,
445 U.S. 55 (1980)..... 3

Pursuant to Rule 15.7 of this Court, the Attorney General of the Commonwealth of Kentucky as counsel for petitioner, Al C. Parke, Warden of the Kentucky State Reformatory, hereby supplements his previously filed briefs for petitioner. The purpose of this supplemental brief is to discuss the Court's opinion in Medina v. California, 51 Crim.L.Rep. 2204 (June 22, 1992). A copy of that opinion was not available to counsel when the Reply Brief for Petitioner was mailed to the Court on June 26, 1992.

In Medina v. California, supra, the Court held that the State of California could consistent with the Federal Due Process Clause require that a criminal defendant bear the burden of proving that he was incompetent to state trial by preponderance of the evidence. The Court relied in part upon Spencer v. Texas, 385 U.S. 554 at 564 (1967); Marshall v. Lonberger, 459 U.S. 422 at 438, n. 6 (1983);

Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, 480 U.S. 228 at 232 (1987). Likewise, the Commonwealth (petitioner) has relied upon the same authorities. (See Brief for Petitioner, pp. 17-18, 21-22, 31-32.)

In Medina, the Court concluded that requiring the prosecution to prove competency to stand trial was not necessary for "deterring lawless conduct by police and prosecution." The Court rejected the argument that the standards of Mathews v. Eldridge, 424 U.S. 319 (1976), should be applied, and instead applied the analysis of Patterson v. New, and Martin v. Ohio, supra. Raley (Respondent) like Medina, has relied upon Mathews v. Eldridge. (Brief for Respondent, pp. 24-27.)

The Kentucky Supreme Court has concluded the validity of a prior conviction is not an element of the Persistent Felony Offender statute (KRS 532.080). Commonwealth v. Gadd, 665 S.W.2d 915 at 917-918 (Ky. 1984). That determination is not contrary to the express language of the

statute and hence does not violate due process. See Martin v. Ohio, supra. That determination is not patently unreasonable so as to violate the Due Process Clause. See Robards v. Rees, 789 F.2d 379 at 385-386 (6th Cir. 1986), discussing Lewis v. United States, 445 U.S. 55 (1980); and Brief for the United States, pp. 11 and 12, n.2, also discussing Lewis.

For the foregoing reasons, the Court should reject Raley's argument based upon Mathews v. Eldridge, supra.

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NO. 91-719

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

AL C. PARKE, WARDEN, PETITIONER

versus

RICKEY HAROLD RALEY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to Rule 25.5 of this court, the Attorney General of the Commonwealth of Kentucky, as counsel for petitioner, Al C. Parke, Warden of the Kentucky State Reformatory, hereby supplements his previously filed briefs for petitioner. The purpose of this brief is to discuss opinions in three cases that were issued after petitioner's brief was filed and were not published by West Publishing Company in time to be received by counsel to be cited in the petitioner's reply brief.

In United States v. Paleo, 967 F.2d 7 at 11-13 (1st Cir. 1992), the First Circuit held that Paleo was entitled to present a "collateral attack" upon prior felony convictions offered by the government to enhance his sentence under the Violent Career Criminal Act, Title 18 U.S.C. §922(g)(i). The First Circuit also held that the defendant must bear the burden of demonstrating the invalidity of the prior convictions, citing inter alia, United States v. Gallman, 907 F.2d 639 at 642-644 (7th Cir.

1990), cert. denied, 111 S.Ct. 1110; United States v. Henry, 933 F.2d 553 at 559 (7th Cir. 1991), cert. denied, 112 S.Ct. 1703; and United States v. Wilkinson, 926 F.2d 22 at 28 (1st Cir. 1991), cert. denied, 111 S.Ct. 2813. (See Brief for Petitioner, pp. 23-24.) The First Circuit noted that the defendant, "after all, is in the best position to know the procedural facts surrounding the prior conviction and to overcome any skepticism arising out of the lateness of the challenge."

In Oliver v. United States, 961 F.2d 1339 (7th Cir. 1992), Oliver collaterally attacked his guilty plea conviction pursuant to Title 28 U.S.C. §2255. He claimed that his guilty plea (entered 17 years earlier) was not knowing, intelligent, and voluntary, even though the plea was entered on advice of counsel. Oliver claimed that he had not been advised of his right to confront his accusers and his privilege against self-incrimination. Any record of the plea proceedings had been lost or destroyed

because of the lapse of time. The district court denied the petition on two grounds. First, the claim was defaulted for failure to raise it on direct appeal since no cause or prejudice was demonstrated. Second, the delay in filing was unreasonable and prejudicial to the government, and hence the claim was barred under the laches doctrine. The Seventh Circuit affirmed on both grounds, citing inter alia, Coleman v. Thompson, 111 S.Ct. 2546 at 2567 (1991). (See Brief for Petitioner, pp. 10-11.)

In United States v. McGlocklin, 962 F.2d 551 (6th Cir. 1992), the Sixth Circuit upheld the validity of a guilty plea and a nolo contendere plea offered for enhancement of McGlocklin's sentence under the United States Sentencing Guidelines and reversed the district court. Both convictions occurred in the Tennessee State Courts. The facts of the nolo plea are somewhat similar to this case. The Sixth Circuit stated regarding that plea, 962 F.2d at 554:

> We find that defendant's Cheatham County nolo contendere plea was valid under constitutional standards. The judge asked defendant if his lawyer had explained to him the charge against him and if he understood the charge . . . . Defendant responded the charge had been explained and that he understood it. The judge also asked the defendant if his lawyer had told him the range of punishment for the crime. Defendant responded that his lawyer had done so. We find that these exchanges on the record, are sufficient to find that defendant was aware of the nature of the charge against him and the penalties he faced. Nowhere in the record before this Court does defendant state that he was actually unaware of any of this information or that his plea was not voluntary. [Emphasis added.]

Regarding the 1981 guilty plea in this case, the plea bargain form signed by Raley showed the offenses he pleaded to and the penalty range for third degree burglary and the five year sentence recommended (and subsequently imposed by the Court). (J.A. 17-18.) Raley admitted that he signed the form, that he told the judge he was not forced to plead guilty, and that he was told he had a right to a jury trial. (J.A. 50-51,

65; TE 19-21, 40-41. See Brief for Petitioner, pp. 36-38; Brief for United States, pp. 3-4.)

The Sixth Circuit's opinion in United States v. McGlocklin, supra, clearly reflects that the Sixth Circuit has not ruled that the lack of the colloquy described in Boykin v. Alabama, 395 U.S. 238 (1969), itself provides a ground to automatically invalidate a prior conviction offered for sentencing enhancement. Hence the Commonwealth's argument to that effect should be considered by this Court. (See Reply Brief for Petitioner, pp. 1-5; Brief for Petitioner, pp. 14-18.)

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